

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI

JANET A LEWIS

Claimant

APPEAL NO. 19A-UI-00659-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 12/09/18

Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Janet Lewis filed a timely appeal from the January 14, 2019, reference 01, decision that held she was disqualified for unemployment insurance benefits and the employer's account would not be charged for benefits, based on the deputy's conclusion that Ms. Lewis was discharged on December 5, 2018 for failure to follow instructions in the performance of her job. After due notice was issued, the appeal hearing commenced on February 19, 2019 and concluded on February 21, 2019. Ms. Lewis participated personally and was represented by attorney John Sorensen. Ted Valenca of Equifax represented the employer and presented testimony through Melissa Jordan, Peggy Lund, Meegan Hanson, and Monique Holland. The hearing in this matter was consolidated with the hearing in Appeal Number 19A-UI-00660-JTT. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant and received Exhibits 1 through 6, 9, 10, 13, 15, 16, 21, 22, 24, 25, 26, 30, 31, 33, 41, 45, 47, 49, 51 and 53 into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Janet Lewis, R.N., was employed by Good Samaritan Society, Inc. on a full-time basis from 1997 until December 5, 2018, when the employer discharged her from the employment. Ms. Lewis performed her work at a 56-bed rehabilitation and skilled care facility in Forest City. Good Samaritan recognized that facility as having the highest staff turnover rate amongst the agency's several Iowa locations. Until June 2018, Ms. Lewis was the Staff Development Coordinator and floor nurse. Ms. Lewis held the Staff Development Coordinator position for several years. As Staff Development Coordinator, Ms. Lewis was responsible for orienting new staff and facilitating staff training. Ms. Lewis worked as a floor nurse at the facility to one extent or another throughout her employment. In May 2018, the facility's Minimum Data Set (MDS) Coordinator separated from the Forest City facility. In that same month, Monique Holland joined Good Samaritan as Human Resources Coordinator at the Forest City facility. In June 2018, Melissa Jordan, became the facility's Director of Nursing Services (DNS) and at that time became Ms. Lewis' supervisor. In October 2018, Meegan Hanson joined the Forest City facility

as Administrator. Ms. Hanson was the third person to take on the administrator duties at the Forest City facility in 2018. Ms. Jordan and Ms. Hanson made the decision to discharge Ms. Lewis from the employment in consultation with Good Samaritan corporate office representatives and communicated that decision to Ms. Lewis on December 5, 2018.

In June 2018, the employer approached Ms. Lewis about becoming the new MDS Coordinator. That conversation took place at the same time the employer told Ms. Lewis that the employer was eliminating her Staff Development Coordinator position. Ms. Lewis accepted the MDS Coordinator position effective June 17, 2018 in lieu of returning to full-time floor nurse duties. The MDS Coordinator position was a specialized Medicaid and Medicare billing position reserved for licensed nurses. The MDS Coordinator's role is to maximize revenue for the facility by ensuring the facility receives maximum reimbursement from Medicaid and Medicare for the services rendered to residents/patients. The MDS Coordinator duties involved assessing every aspect of a resident's care at the rehabilitation and skilled facility, including the level of care needed, diet and nutrition, the need for assistance with eating, and the need for assistance with transfers within the facility. The MDS Coordinator's duties included timing various resident/patient therapies to maximize Medicare/Medicaid reimbursement rates. To complete the MDS assessment for a particular resident/patient, the MDS Coordinator has to review all relevant records concerning the resident/patient's care, interact with staff to obtain any additional necessary information, and generate a report. The time required to assess a particular patient and generate a report could take anywhere from 30 minutes to four hours. The employer viewed the MDS Coordinator duties as less than full-time work and designated 24 hours of Ms. Lewis' 40-hour work week as time to be dedicated to MDS work. During the other 16 hours in the work week, the employer assigned Ms. Lewis to floor nursing duties. Due to the nature of the work environment and because patient care took precedence, Ms. Lewis was frequently interrupted to attend to patient care matters during times when she was not assigned to floor nursing duties. At one point toward the end of the employment, the employer acknowledged that Ms. Lewis had a full-load and could not take on additional duties.

The employer has a MDS Coordinator training program. The training program includes online training modules, referred to as MDS-JOT and AANAC, and one-on-one mentoring sessions with a Clinical Compliance Consultant. Some new MDS Coordinators are able to complete the online training requirement after dedicating 40 hours to the online training. Some MDS Coordinators work on the online training in the workplace and others complete at least a portion of the online training at home. On average, new MDS Coordinators are able to complete the online training and mentoring within six to eight weeks of starting the training. MDS Coordinators generally also have direct patient care responsibilities.

The employer's decision to discharge Ms. Lewis from the employment was based primarily on Ms. Lewis' failure to complete the MDS training during the period of June 17, 2018 through December 3, 2018 and on Ms. Lewis missing one-on-one meetings with Peggy Lund, Clinical Compliance Consultant. At the time of discharge, the employer did not know how far Ms. Lewis got in online training. Ms. Lewis had completed the bulk of the MDS-JOT online training, but had eight of the 10 AANAC modules to complete before she could receive the required MDS certification. Ms. Lewis attended several one-on-one "zoom" video-conference meetings with Ms. Lund, but missed some of those scheduled meetings for various reasons.

The final incident that triggered the discharge was Ms. Lewis' absence from a zoom meeting set for Monday, December 3, 2018 from 11:45 a.m. to 12:15 p.m. Ms. Lewis was absent from that meeting due to the need to seek medical care for the rapid onset of acute diabetes symptoms that included blurred vision, a dangerously high blood sugar measurement, and impaired thinking. Ms. Lewis had experienced such symptoms during the preceding weekend, decided against traveling the 30 to 40 miles to access urgent care and set up medical appointment shortly after her Forest City doctor's office opened at 8:00 a.m. on December 3. At 9:01 a.m., Ms. Lewis sent an email message to Ms. Hanson, pursuant to the employer's previous directive,

to let Ms. Hanson know about her need to go to the doctor. Ms. Hanson was at that time away from the workplace at a meeting, but immediately received the email message via her notebook computer. Ms. Hanson did not respond to the email message. Ms. Lewis had also copied Ms. Holland and other staff on the message. Ms. Lewis also spoke to Ms. Jordan before she left for her 9:45 a.m. medical appointment to let her know her symptoms and that she was seeking medical attention for her symptoms. Ms. Jordan, Ms. Hanson, and Ms. Holland were unaware of Ms. Lewis' 11:45 a.m. zoom conference meeting until Ms. Lund contacted the facility that afternoon to advise that Ms. Lewis had missed the appointment. The appointment lasted longer than Ms. Lewis expected. Ms. Lewis returned to the Good Samaritan facility at 12:15 p.m., shortly after her medical appointment ended, but did not contact Ms. Lund until 2:00 p.m. regarding the missed mentoring appointment. Ms. Lewis had not alerted Ms. Lund prior to the appointment that she could or would miss the appointment.

The one-on-one mentoring session set for 11:45 a.m. on December 3, 2018 had initially been set for 11:30 a.m. on November 30, 2018. Ms. Lewis had joined that November 30 video-conference meeting earlier than scheduled. Ms. Lund terminated that meeting as soon as she learned that Ms. Lewis was participating from her home, rather than from the workplace. Due to the many distractions Ms. Lewis faced when trying to work on the MDS Coordinator training in the workplace, Ms. Jordan and/or Ms. Hanson had previously granted Ms. Lewis permission to complete the online training from home. However, Ms. Lewis had not discussed with them her desire to participate from home in the one-on-one sessions with Ms. Lund. Ms. Lund had notified Ms. Lewis on November 21 that she would not hold the one-on-one training sessions with Ms. Lewis when Ms. Lewis was at home. While the employer now asserts HIPAA concerns as part of the basis for not wanting Ms. Lewis to participate from home, Ms. Lund raised no such concerns at the time and was at the time more concerned with Ms. Lewis potentially not being on the clock during the one-on-one mentoring sessions. Ms. Lund had made appropriate arrangements for privacy in connection with her participation from home.

The rescheduled November 30 mentoring session and the December 3 missed mentoring session occurred in the context of Ms. Lewis taking longer than expected to complete the MDS Coordinator training, in the context of the employer's internal discussion regarding whether Ms. Lewis might not be right for the MDS Coordinator position, in the context of prior missed mentoring sessions, in the context of a verbal reprimand issued on October 31, 2018 and two written reprimands issued in November 2018, and in the context of costly errors a substitute MDS Coordinator had identified in Ms. Lewis' work and brought to the employer's attention on November 8, 2018.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires

consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The weight of the evidence in the record establishes legitimate employer concerns, but a discharge that does not disqualify Ms. Lewis for unemployment insurance benefits. The final incident that triggered the discharge was an absence due to serious illness, which absence was properly reported to the employer. The absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Lewis for unemployment insurance benefits. The circumstances surrounding the absence provide a reasonable basis for Ms. Lewis' failure to alert Ms. Lund to her need to reschedule the December 3, 2018 mentoring session. Ms. Lewis had made herself available for the appointment as initially set, but Ms. Lund had refused to go forward with that earlier appointment. Despite the concerns that unfolded in the months that followed Ms. Lewis' agreement to assume the MDS Coordinator duties, the evidence does not establish a "current act" of misconduct. Ms. Lewis is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits.

DECISION:

The January 14, 2019, reference 01, decision is reversed. The claimant was discharged on December 5, 2018 for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs