

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANN M TITUS**  
Claimant

**APPEAL NO. 12A-UI-04067-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE HON COMPANY**  
Employer

**OC: 04/17/11  
Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Ann Titus filed a timely appeal from the April 6, 2012, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on May 3, 2012. Ms. Titus participated. Debra Campbell of Employers Edge represented the employer and presented testimony through Holly Fischer and Ryan Pearson. Exhibit One was received 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: Ann Titus was employed by The Hon Company as a full-time machine operator from September 2011 until March 14, 2012, when Holly Fischer, Member and Community Relations Generalist, and Ryan Pearson, Group Leader, discharged her for attendance. Mr. Pearson was Ms. Titus' immediate supervisor. Ms. Titus' regular work hours were 6:10 a.m. to 2:30 p.m. When overtime was required, Ms. Titus' work hours were 5:10 a.m. to 3:30 p.m.

The employer's attendance policy required that Ms. Titus call an automated phone line at least 15 minutes prior to her scheduled start time if she needed to be absent.

The final absence that triggered the discharge occurred on March 14, 2012. On that day, Ms. Titus called the designated number at 4:30 a.m. Ms. Titus was scheduled to work at 5:10 a.m. Ms. Titus was sick and her son was recovering from an illness. Ms. Fischer contacted Ms. Titus later in the day to notify her that she was discharged from the employment. Ms. Titus had left work at 6:30 a.m. on March 12 to care for her child. The child had a high fever and could not remain at the daycare provider because of the risk of communicating the illness to others. Ms. Titus left work early with the approval of her supervisor. Ms. Titus took the child to the doctor and the child was diagnosed with the flu. Ms. Titus had been able to arrange for a family member to stay with her child on March 13 and returned to work that day. Ms. Titus worked her whole shift on March 13.

Ms. Titus' next most recent absence had been on January 16, when Ms. Titus' son had again been ill. Ms. Titus had properly notified the employer of the need to be absent. The employer also considered earlier absences, most of which due to illness of Ms. Titus or her child and most of which were properly reported to the employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 individual shall be disqualified for benefits 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.

871 IAC 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.

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

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 871 IAC 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 871 IAC 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 that the final absence on March 14, 2012 was due to absence and was properly reported to the employer. The absence was an excused absence under the applicable law and cannot be used as the basis for a finding of misconduct. The absence on March 12 was due to illness of a minor, dependent child and was properly reported to the employer. It, too, was an excused absence under the applicable law and cannot be used as the basis for a finding of misconduct. The next most recent absence was in January. The evidence fails to establish a current act of misconduct. Accordingly, the administrative law judge must find that Ms. Titus was discharged for no disqualifying reason. Because there was no current act of misconduct, the administrative law judge need not consider the earlier absences or whether they were excused or unexcused under the law. Ms. Titus is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Titus.

**DECISION:**

The Agency representative's April 6, 2012, reference 03, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/css