

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**HILLARY A MENKEN**

Claimant

**APPEAL NO. 09A-UI-17623-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALLEN MEMORIAL HOSPITAL**

Employer

**OC: 10/25/09**

**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 12, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 4, 2010. Claimant Hillary Menken participated. Abby Meester, Human Resources Assistant, represented the employer and presented additional testimony through Jennifer Friedley, R.N., Clinical Director Surgical Services.

**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: Hillary Menken was employed by Allen Memorial Hospital as a full-time Scrub Tech from July 2009 until October 23, 2009 when Dorothy Eddins, Acting Surgery Director, and Ken Leibold, Human Resources Director, discharged her from the employment.

The final incident that triggered the discharge is alleged to have occurred on October 20, 2009 at about noon. The employer alleges that Ms. Menken telephoned a secretary at Waverly Hospital and told that person, "Keep your f---ing manager there. We do not want her here." The secretary reported the telephone call to Jennifer Friedley, R.N., Director of Surgery at Waverly Hospital. Ms. Friedley was about to join Allen Memorial Hospital as Clinical Director Surgical Services. Ms. Menken had previously worked at Waverly Hospital. Ms. Menken had made a telephone call to the secretary on October 20 at a time when she was off-duty. Ms. Menken denies she made a statement attributed to her. At the time the employer discharged Ms. Menken, the employer acknowledged it could not prove the allegation, but had decided to discharge Ms. Menken nonetheless based on an apparent personality conflict between Ms. Menken and coworkers.

In making the decision to discharge Ms. Menken from the employment, the employer considered an incident on September 1, when Ms. Menken had come to work wearing a T-shirt

that referenced an alleged clique at Waverly Hospital. The acting Nursing Manager told Ms. Menken it would be better if she did not wear such clothing and Ms. Menken agreed not to wear such clothing in the future.

On October 14, the acting Nursing Manager gave Ms. Menken her 90-day review, referenced an apparent personality conflict between Ms. Menken and other Scrub Tech's, and stressed the need for better communication between Ms. Menken and the other Scrub Tech's.

## **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).

The employer has failed to present sufficient evidence, or sufficiently direct and satisfactory evidence, to prove that Ms. Menken made the comments attributed to her. There were only two people involved in the telephone call. One of those was Ms. Menken, who testified she did not make the comments attributed to her. The other was the secretary from Waverly Hospital, whom the employer did not have testify. The administrative law judge is unable to attach credibility to the Waverly Hospital secretary because she did not testify. The administrative law judge cannot assume the content of the telephone conversation was correctly communicated to Ms. Friedley, whom the employer did have testify.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Menken was discharged for no disqualifying reason. Accordingly, Ms. Menken is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Menken.

**DECISION:**

The Agency representative's November 12, 2009, reference 01, decision is affirmed. 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/pjs