

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LOUANN KENNEDY-HURD

Claimant

APPEAL NO. 12A-UI-06983-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC

Employer

OC: 05/13/12

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 4, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 9, 2012. Claimant participated. Lori Welch represented the employer and presented additional testimony through Chelsea Krause and Gwen Musick. The administrative law judge took official notice of the documents submitted for and generated in connection with the fact-finding interview.

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: Louann Kennedy-Hurd was employed by Good Samaritan Society, Inc., as a full-time Licensed Practical Nurse from 2007 until May 14, 2012, when Human Resources Director Lori Welch, Director of Nursing Gwen Musick, and Interim Administrator Ruth Leitel discharged her from the employment. Ms. Kennedy-Hurd's immediate supervisor was Unit Manager Kayl Armstrong. Ms. Kennedy-Hurd was assigned to the day shift and work hours were 6:00 a.m. to 2:30 p.m.

The sole basis of the discharge was Ms. Kennedy-Hurd's early departure on May 9, 2012. On that day, Ms. Kennedy-Hurd and another nurse, Chelsea Krause, L.P.N., were scheduled to work on the employer's Alzheimer's unit. Ordinarily, the employer would schedule just one nurse for the unit, along with three nurses' aides. Because the employer had been experiencing problems with the aides being absent, the employer had started scheduling two nurses to the day shift so that one of the nurses could be available to perform work that the aides would ordinarily perform. On May 9, all three aides showed for their shifts. Ms. Krause discussed with Ms. Kennedy-Hurd how they might divide up the nursing duties and asked Ms. Kennedy-Hurd her preference. Ms. Kennedy-Hurd struggled to give an answer. At about that same time, the overnight charge nurse, Tanya Mefford, L.P.N., started to give Ms. Kennedy-Hurd the shift-change report. Ms. Kennedy-Hurd became visibly upset and began to cry. Ms. Kennedy-Hurd was struggling with depression and was at that moment feeling overwhelmed.

Ms. Kennedy-Hurd said, "I can't do this today." Later in the conversation, Ms. Kennedy-Hurd added that she thought it was best just to go home. Ms. Kennedy-Hurd then left the workplace and went home. Ms. Krause completed an absence slip to document Ms. Kennedy-Hurd's early departure and submitted it to the facility administration.

Ms. Kennedy-Hurd had struggled with depression for years and was on prescription medications to manage the illness. Ms. Kennedy-Hurd's father had passed away within the previous month. Ms. Kennedy-Hurd had taken time away from work to care for her ailing father and had just returned to work a couple weeks earlier.

Later on May 9, Ms. Welch and Ms. Musick telephoned Ms. Kennedy-Hurd. Ms. Kennedy-Hurd explained at that time that she had been struggling with depression. The employer asked Ms. Kennedy-Hurd why she had not called back to speak with a member of the administrative team and Ms. Kennedy-Hurd indicated she had been unaware that she needed to do that since she had informed the two nurses before she left. The employer shared with Ms. Kennedy-Hurd that the employer considered the early departure without contacting a supervisor or member of the administration team to be job abandonment.

Ms. Kennedy-Hurd returned to work the next day and worked her entire shifts on May 10 and 11. After Ms. Kennedy-Hurd had completed her shift on May 11, the employer notified her she needed to appear for a meeting on May 14. Ms. Kennedy-Hurd appeared for the meeting and was discharged from the employment at that time.

The employer has a written attendance policy that is separate from the employee handbook. The written policy indicated that employees must notify their supervisor, a department manager, or administrator as far in advance if they needed to be absent. The policy further indicated that employees were responsible for notifying their supervisor or a charge nurse and to find a replacement if they were unable to work their shift. At the time Ms. Kennedy-Hurd left on May 9, she was unaware that she needed to do more to inform the employer of her need to leave. Indeed, the Unit Manager, Administrator, Human Resources Supervisor, Director of Nursing, and Assistant Director of Nursing were not yet at the workplace when Ms. Kennedy-Hurd left around 6:30 a.m. A charge nurse had been working in a different building, but Ms. Kennedy-Hurd thought it was sufficient to notify Ms. Mefford, the night charge nurse. This was the same method of notice Ms. Kennedy-Hurd had used on prior occasions when she needed be absent from a shift. Ms. Kennedy-Hurd had only left work early on one occasion, while the Unit Manager was present, and had notified the Unit Manager at that time.

The employer's handbook listed leaving work early without supervisor approval as a Group II offense that would subject Ms. Kennedy-Hurd to a written warning for the first offense. The handbook listed job abandonment as a Group III offense that would subject employees to termination of the employment for a first offense. The policy defined job abandonment as including, but not being limited to, "leaving work without supervisory notification and approval; failure to obtain an appropriate relief/replacement person after having reported to work in order to ensure the safety and welfare of residents and clients."

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.

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The weight of the evidence establishes that Ms. Kennedy-Hurd reasonably concluded that she had satisfied the employer's attendance policy requirements when she left work early on May 9 due to a bona fide mental illness. The evidence indicates that Ms. Kennedy-Hurd was overcome with depression symptoms on the morning of May 9. A reasonable person would have no difficulty discerning Ms. Kennedy-Hurd's emotional distress that morning. The evidence indicates that when Ms. Kennedy-Hurd left, her unit was fully staffed because all aides had appeared for work and another nurse, Ms. Krause, had been scheduled on the unit. The evidence indicates that Ms. Kennedy-Hurd notified the charge nurse who was immediately present, Ms. Mefford, and Ms. Krause, of her need to leave before she departed. A reasonable person would not have expected Ms. Kennedy-Hurd to do more to notify the employer under the circumstances. The administrative law judge concludes the absence was an excused absence under the applicable law, despite how the employer may have decided to characterize it.

The evidence indicates that Ms. Kennedy-Hurd had no intention to abandon or separate from the employment by leaving early on May 9 and communicated nothing to indicate that she intended to separate from the employment. In other words, neither her comments nor conduct communicated a voluntary quit. This conclusion is reinforced by Ms. Kennedy-Hurd's return to work the next day. The evidence further indicates that Ms. Kennedy-Hurd had been a responsible, dedicated employee up to that point. The employer acknowledges that the May 9 early departure was out of character for Ms. Kennedy-Hurd.

Even if the May 9 absence were an unexcused absence under the applicable law, that single absence would not be sufficient to establish misconduct in connection with the employment.

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

DECISION:

The Agency representative's June 4, 2012, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw