

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHLEEN M MCCALLISTER

Claimant

APPEAL NO. 11A-UI-12053-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUNNY BROOK SENIOR LIVING LLC

Employer

OC: 07/17/11

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 September 7, 2011, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on October 6, 2011. Claimant Kathleen McCallister participated. Sarah Ingstad, Manager, represented the employer.

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: Kathleen McCallister was employed by Sunny Brook Senior Living as a full-time universal worker from March 2010 until July 15, 2010, when Sarah Ingstad, Manager, and Terri Buster, R.N., discharged her for attendance. Ms. Buster was Ms. McCallister's immediate supervisor. Ms. McCallister worked the 11:00 p.m. to 7:00 a.m. overnight shift. The employer's attendance policy required that Ms. McCallister notify the employer as soon as possible prior to her shift if she needed to be absent and obligated Ms. McCallister to find someone to cover the shift. The employer preferred at least four hours' notice. Ms. McCallister was aware of the policy.

The final absence that prompted the discharge was Ms. McCallister's absence from the shift that started at 11:00 p.m. on July 13, 2010. Ms. McCallister notified the nurse on duty at 10:15 p.m. that she would be absent due to illness. Ms. McCallister attempted to locate a replacement to cover her shift, but was unable to secure someone. Ms. McCallister notified the nurse on duty that she was unable to locate a replacement.

The next most recent absence that factored in the discharge occurred May 16, 2010, when Ms. McCallister was absent from her full shift due to illness. Ms. McCallister notified the employer prior to the shift that she needed to be absent. Ms. McCallister did not attempt to find a replacement.

The next most recent absence was on April 4, 2010, when Ms. McCallister was again absent due to illness. Ms. McCallister notified the employer prior to the shift.

On May 19, the employer had issued a reprimand for attendance.

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 evidence in the record establishes that the employer waived the four-hour notice requirement contained in its attendance policy and accepted notice that came prior to the scheduled start of the shift. The weight of the evidence indicates that each of Ms. McCallister's absences was due to illness reported to the employer prior to the scheduled start of the shift. Each of these absences was an excused absence under the applicable law. Under the ruling in, Gaborit, Ms. McCallister's failure to find a replacement cannot change the absences from excused under the applicable law to unexcused.

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

DECISION:

The Agency representative's September 7, 2011, reference 03, 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/pjs