

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA A ORR
Claimant

APPEAL NO. 12A-UI-13328-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**HJD SUB TENANT LLC
HOTEL JULIEN DUBUQUE**
Employer

**OC: 09/30/12
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 October 26, 2012, reference 01, decision that allowed benefits and that said the employer's account could be charged for benefits. After due notice was issued, a hearing was held on December 5, 2012. Claimant Lisa Orr participated. Employer representative Melissa Kindred was not available at the number she had provided for the hearing and did not participate in the hearing. Ms. Kindred contacted the Appeals Section at 2:10 p.m. with regard to the hearing set for 11:00 a.m. Ms. Kindred did not provide good cause to re-open hearing record.

ISSUE:

Whether Ms. Orr 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: Lisa Orr was employed as a part-time cosmetologist at the Potosa Spa, located inside the Hotel Julien Dubuque from August 2011 until October 1, 2012, when Melissa Kindred, Potosa Spa Manager, discharged her from the employment. Ms. Kindred notified Ms. Orr of the discharge on October 3, 2012. Ms. Orr had last performed work for the employer on September 29, 2012. On Monday, October 1, 2012, Ms. Orr notified the employer that her daughter had a fever of 103 and that Ms. Orr needed to take her daughter to a doctor. Ms. Orr was on-call for the employer that day, but did not have any clients scheduled and had not been called in to work. Ms. Orr offered to come in after her daughter was finished at the doctor's office. Ms. Kindred approved Ms. Orr to take the day off. Ms. Orr stopped by the workplace before she left Dubuque after the doctor's visit and noted that she had been taken off the schedule. On Wednesday, October 3, Ms. Kindred told Ms. Orr that she was discharged from the employment. Ms. Kindred cited an incident that had occurred in the salon a month earlier as the basis for the discharge.

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).

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 did not appear for the scheduled hearing and thereby did not present any evidence to support an allegation that Ms. Orr was discharged for misconduct in connection with the employment.

The weight of the evidence indicates that the incident that immediately preceded the discharge was an absence due to illness of a dependent child, which absence was appropriately reported to the employer. That absence was an excused absence under the applicable law and cannot serve as a basis for disqualifying Ms. Orr for unemployment insurance benefits. 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).

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).

The weight of the evidence fails to establish a current act of misconduct. The incident the employer referenced at the time of discharge had occurred a month earlier.

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

DECISION:

The Agency representative's October 26, 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/pjs