

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**COLIN K JOHNSON**  
Claimant

**APPEAL NO. 12A-UI-05078-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**PETSEL VENTURS LLC**  
Employer

**OC: 04/08/12**  
**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 April 26, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 23, 2012. Claimant Colin Johnson did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Danise Petsel, Managing Owner, represented the employer. Exhibits One and Two were 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: The employer operates Iowa River Power Restaurant in Coralville. Colin Johnson was employed as a part-time bartender from November 2011 until February 23, 2012, when the employer discharged for him attendance. Mr. Johnson's immediate supervisor was Matt Winchester, Service and Bartending Manager. Mr. Johnson was scheduled to work a double shift on February 23, 2012. The morning shift was to start at 10:30 a.m. The evening shift was to start at 3:30 p.m. Mr. Johnson did not appear for the morning shift or contact the employer to advise that he would be absent from the shift. Mr. Winchester made multiple attempts to reach Mr. Johnson and finally reached Mr. Johnson at 3:00 p.m. In the meantime, the employer had called in another bartender to work the morning shift.

At the time Mr. Winchester made contact with Mr. Johnson, Mr. Johnson asserted that he had traded the morning shift with another employee. The employer's policy required that any change in the schedule be approved by a manager. Mr. Johnson had not had the purported shift change approved by a manager. The employer doubted whether there had in fact been an understanding between Mr. Johnson and the other bartender about trading shifts. Though Mr. Johnson was available to work the 3:30 p.m. shift, the employer elected to have another employee work that shift and discharged Mr. Johnson from the employment.

The employer's decision to discharge Mr. Johnson was employment was based solely on the events on March 23. Mr. Johnson had one prior absence that was for illness 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).

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 a single unexcused absence on the morning of March 23, 2012. The weight of the evidence also indicates that Mr. Johnson was negligent in not following the established protocol for proposed changes to the schedule. There evidence in the record is insufficient to establish that Mr. Johnson was dishonest with the employer when he asserted that he believed he had traded with another employee. While the decision to end the employment was within the discretion of the employer, there is insufficient evidence to establish a discharge for misconduct in connection with the employment that would disqualify Mr. Johnson for unemployment insurance benefits. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Johnson was discharged for no disqualifying reason. Accordingly, Mr. Johnson is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Johnson.

**DECISION:**

The Agency representative's April 26, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he 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

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