

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE N ALBER
Claimant

APPEAL NO. 17A-UI-10553-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND DENTAL LLC
Employer

OC: 09/17/17
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 6, 2017, reference 01, decision that allowed benefits to the claimant Michelle Alber provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that Ms. Alber was discharged on September 14, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on November 1, 2017. Ms. Alber participated. Morgan Semple represented the employer and presented additional testimony through Darcy Griffith. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant. The administrative law judge took official notice of the materials submitted for and generated in connection with the October 3, 2017 fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Alber was employed by Heartland Dental, L.L.C, a two-provider dental clinic, as a full-time, licensed dental assistant during two distinct periods. Ms. Alber's most recent employment began in September 2016 and ended on September 24, 2017, when Darcy Griffith, Practice Manager of Operations, discharged Ms. Alber from the employment. Ms. Griffith was Ms. Alber's immediate supervisor from December 2016 until the end of the employment. Ms. Alber's usual scheduled work hours were 7:45 a.m. to 5:00 or 6:00 p.m.

The final incident that triggered the discharge was Ms. Alber's unauthorized early departure on September 13, 2017. Ms. Alber left early at 1:00 p.m. because the other dental assistant, Margarita Harris, had been rude to her during a discussion about scheduling lunch breaks around patient treatment needs. Ms. Alber had an ongoing personality conflict with Ms. Harris, a conflict to which both contributed equally. Ms. Alber's decision to leave work early was also based on Ms. Alber's belief that the dentist working that day, Dr. Tanya Toulabi, D.D.S., had been rude to Ms. Alber that day by not speaking to Ms. Alber. Dr. Toulabi had recently transitioned from part-time work in the clinic to full-time. Ms. Alber preferred not to work with Dr. Toulabi, whom she perceived as being slower than the other dentist, Dr. Aproxin Singh, D.D.S. Ms. Alber was Dr. Singh's primary dental assistant and Ms. Harris was Dr. Toulabi's primary dental assistant. Each dental assistant was expected to assist both dentists as needed to facilitate patient care. Each dentist had three treatment rooms at their disposal and often needed the assistance of more than one dental assistant to facilitate patient care. On the day in question, Dr. Toulabi was the only dentist at the clinic. Before Ms. Alber left early without authorization, Ms. Griffith warned Ms. Alber that the unauthorized early departure could lead to Ms. Alber being discharged from the employment. Ms. Alber's early departure caused several patients to have to wait longer than usual to receive dental care that afternoon. Immediately before Ms. Alber left work early, a particular patient's appointment had been "converted" from a dental checkup appointment to dental procedure appointment, based on the patient's need for a tooth filling. When Ms. Alber returned to work on September 14, Ms. Griffith summoned her to a meeting to discuss the previous day's events. Ms. Alber anticipated that her early departure on September 13 would result in a written reprimand and asked Ms. Griffith for the written reprimand so she could sign it. Ms. Griffith told Ms. Alber that she could resign or be discharged from the employment. When Ms. Alber declined to resign, Ms. Griffith discharged her from the employment.

While the early departure on September 13, 2017 was the primary basis for the discharge, prior concerns factored in the discharge decision. On September 6, 2017, Ms. Griffith and Dr. Singh counseled Ms. Alber for not clocking out for lunch breaks during the preceding two weeks. Ms. Alber was supposed to have a 30 to 60-minute unpaid lunch break during her shift, but all parties understood this was not always possible, due to patient treatment needs. Ms. Griffith was able to identify three days during the two-week period in question where there had been sufficient time to clock out and take a lunch break. Ms. Griffith attributed Ms. Alber's failure to clock out on those days to oversight. Dr. Singh agreed to be more mindful in scheduling patient care so as to allow for Ms. Alber's lunch break. Dr. Singh instructed Ms. Alber to in the future promptly notify Ms. Griffith if she was unable to take a lunch break, so that such instances could be noted for payroll purposes. On August 24, 2017, Ms. Griffith had counseled Ms. Alber and Ms. Harris regarding their ongoing interpersonal conflict. That conflict had not included any outbursts on the part of Ms. Alber, but instead had included complaints from Ms. Alber that she did not think Ms. Harris provided adequate back up and support to Ms. Alber. In January 2017, Ms. Griffith and Dr. Singh had counseled Ms. Alber regarding the negative relationship between Ms. Alber and Ms. Harris and Ms. Alber allegedly directing rude and inappropriate comments to Ms. Harris.

Ms. Alber established a claim for unemployment insurance benefits that was effective September 17, 2017 and has received \$2,316.00 in benefits for the six-week period of October 1, 2017 through November 11, 2017.

On October 3, 2017, a Workforce Development claims deputy held a fact-finding interview that addressed Ms. Alber's separation from the employment. The employer participated in the fact-finding interview through Morgan Semple.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Excessive unexcused absences will constitute misconduct in connection with employment that disqualifies a claimant for unemployment insurance benefits. Iowa Administrative Code rule 871-24.32(7). 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. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

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 provided 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, the effect of the employee's absence, 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. *Id.*

Only one unexcused absence factored in Ms. Alber's discharge. In short, Ms. Alber walked off the job. The nature of Ms. Alber's work and effect of Ms. Alber's early departure weigh against her and are sufficient to establish misconduct in connection with the employment, based on the September 13, 2017 early departure. On September 13, Ms. Alber, a licensed dental assistant, abandoned her dental assistant duties in a manner and context that directly and adversely impacted multiple patients and undermined clinic operations. Ms. Alber knew at the time she left early without authorization that her early departure would undermine clinic operations and elected to leave despite that knowledge. Before Ms. Alber left early, Ms. Griffith highlighted the seriousness of Ms. Alber abandoning her duties by specifically warning Ms. Alber that the early departure could lead to discharge from the employment. Neither Dr. Toulabi's actions nor Ms. Harris' actions would have prompted a reasonable person in Ms. Alber's situation to abandon her duties on September 13, 2017. Ms. Alber testified that Dr. Toulabi's purported rudeness was limited to Dr. Toulabi not speaking to Ms. Alber. The evidence establishes that Ms. Harris did at times ignore Ms. Alber during the shift and did at times come across as curt during the shift. The weight of the evidence establishes that Ms. Harris' actions were based primarily on her being busy with assisting Dr. Toulabi, though the past interpersonal conflict was also likely a factor. Regardless, Ms. Harris' conduct on September 13 fell far short of providing a reasonable basis for Ms. Alber to abandon her duties. Ms. Alber's early departure on September 13 included notice to the employer, albeit at the time of the departure, did not involve dishonesty on the part of Ms. Alber. The weight of the evidence establishes that Ms. Alber acted with intentional and substantial disregard of the employer's interests on September 13, 2017. The prior meetings referenced in Ms. Griffith's testimony establish context for the final incident, but do not establish prior incidents of misconduct.

The weight of the evidence establishes disqualifying misconduct in connection with the employment based on the early departure on September 13, 2017. Accordingly, Ms. Alber is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Alber must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. Alber received \$2,316.00 in benefits for the six-week period of October 1, 2017 through November 11, 2017, but this decision disqualifies her for those benefits. Accordingly, Ms. Alber has been overpaid \$2,316.00 in benefits for the six-week period of October 1, 2017 through November 11, 2017. Because the employer participated in the fact-finding interview, Ms. Alber is required to repay the overpaid benefits. The employer's account is relieved of liability for benefits including benefits already paid to Ms. Alber.

DECISION:

The October 6, 2017, reference 01, decision is reversed. The claimant was discharged on September 14, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs