

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**SHERRY L KARNs
702 SWAYZE ST
MARSHALLTOWN IA 50158**

**HOLLYWOOD ENTERTAINMENT
HOLLYWOOD VIDEO
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 05A-UI-05667-JTT
OC: 05/08/05 R: 02
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Hollywood Video filed a timely appeal from the May 24, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 5, 2005. Sherry Karns participated. Store Director Alice Neith represented the employer and presented additional testimony through Regional Loss Prevention Officer Mark Johnson. Exhibits One through Nine, Eleven, A through E, and G were received into evidence.

FINDINGS OF FACT:

Sherry Karns was employed by Hollywood Video as a full-time Assistant Director through April 27, 2005, when Store Director Alice Neith discharged Ms. Karns for allegedly falsifying her time reporting information. Ms. Karns had commenced employment at Hollywood Video on September 9, 1997.

The final conduct that prompted the discharge occurred on April 26-27 and came to the attention of the employer on April 27. On April 26, Ms. Karns worked at the store with Shift Leader Tania Meling. The store was busy at dinnertime and the two women decided that Ms. Karns would go pick up a sandwich for the both women. Ms. Karns did not clock out. Ms. Karns was gone for approximately 20 minutes. Ms. Meling closed out the register at the close of business. Ms. Karns expected that Ms. Meling would enter the appropriate time reporting information for both women regarding the lunch break in the course of closing out the register. This did not happen. Time reporting records pertaining to April 26 contain information for Ms. Karns and Ms. Meling. Those records indicate that Ms. Karns clocked in at 5:05 p.m. and clocked out at 1:30 a.m. The records for Ms. Meling indicate a clock in at 4:50 p.m. and a clock out at 1:30 a.m. The records do not reflect a lunch break for either employee.

Though the incident on April 26 occurred immediately prior to the termination. Store Director Alice Neith had already conducted her own investigation into time reporting irregularities on the part of Ms. Karns. On April 25, Ms. Karns had contacted Regional Loss Prevention Officer Mark Johnson and requested that he come to the store to further investigate the matter.

Ms. Neith had commenced an investigation into Ms. Karns' time reporting habits after an incident on April 14 that had come to her attention on April 15. On April 14, 2005, Ms. Karns attended a meeting in Ankeny, but left early because she had already seen the presentation scheduled for the afternoon. Ms. Karns departed the meeting at 1:30 p.m. Store Director Alice Neith expected Ms. Karns would head directly back to the Marshalltown store, but did not specifically instruct Ms. Karns to do so. Ms. Karns took the opportunity to stop at a few stores to shop for items to use in the store as part of a game promotion that had just started and for which Ms. Karns was responsible. Ms. Karns did not end up buying anything. Ms. Karns arrived at the Marshalltown store at approximately 3:45 p.m., left to take her daughter to a school function, and returned at 5:00 p.m. to work on a display. On April 15, Ms. Neith learned of Ms. Karns' delayed return to the store the previous day, as well as the additional events of the previous afternoon. Time reporting records indicate that on April 14, Ms. Karns used Ms. Neith's code at 5:08 p.m. to enter a clock in time of 9:00 a.m., a clock out time of 5:00 p.m., and a lunch break at 12:30-1:00 p.m.

As Ms. Neith questioned other employees regarding Ms. Karns time reporting practices, an additional incident on April 7 came to her attention. Time reporting records indicate that on April 7, Ms. Karns clocked in at 11:26 a.m., clocked out at 9:38 p.m. and clocked out for lunch from 3:11-3:46 p.m.

On April 18, Ms. Neith solicited a written statement from Shift Leader Courtney Peterson. In the statement, Ms. Peterson indicated that on April 7 she had been working a 12:00-8:00 p.m. shift, that she had been informed Ms. Karns had taken a lunch break earlier in the day, and that Ms. Karns subsequently departed the store for 45 minutes without clocking out. Ms. Peterson indicated in her statement that employee Tonia Meling had knowledge of the same incident.

On April 19, Ms. Neith solicited a written statement from Assistant Director Kathy Wunschel. In the statement, Ms. Wunschel indicated that on April 7, Ms. Karns was scheduled to work 12:00-8:00 p.m., that Ms. Karns clocked out at 3:10 p.m. to pick up her daughter, that Ms. Wunschel then left, and that 15 minutes after Ms. Wunschel left, Ms. Karns left the store for about an hour. How Ms. Wunschel was aware of Ms. Karns' activities after Ms. Wunschel left the store is unclear.

On April 19, Ms. Neith solicited a written statement from Shift Leader Tonia Meling. In the statement, Ms. Meling indicated that on April 7, Ms. Karns left the store for more than an hour and a half, during which time she took an item to her daughter's workplace and took a second lunch break, and that Ms. Karns had not clocked out. Ms. Meling further indicated that on April 14, Ms. Karns had arrived back at the Marshalltown store from the meeting in Ankeny at 3:45-4:00 p.m., that Ms. Karns advised she had gone shopping, that Ms. Karns left to take her daughter to a school function and indicated she would be back at 5:00 p.m. to work on a window display.

On April 27, Regional Loss Prevention Officer Mark Johnson went to the Marshalltown store to conduct an investigation. Mr. Johnson had previously reviewed the statements provided by Ms. Neith. Mr. Johnson apparently spoke with Ms. Meling and Ms. Neith before interviewing Ms. Karns. Ms. Karns consented to be interviewed and provided a written statement. Ms. Karns did not have access to her time reporting information at the time of the interview and relied upon information provided by Mr. Johnson as the time she had returned to the store on April 14. Ms. Karns indicated in her written statement that she had, on occasion, unintentionally falsified time and attendance information.

REASONING AND CONCLUSIONS OF LAW:

The broad question is whether the evidence in the record establishes that Ms. Karns was discharged for misconduct in connection with her employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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 to misconduct, a discharge her 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).

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 evidence the employer submitted into the record is troubling for several reasons. Though the employer alleges a time reporting irregularity in connection with Ms. Karns' shift on April 26, the employer offered no testimony from the coworker with whom Ms. Karns worked on that date. In addition, Ms. Neith indicated through her testimony a lack of knowledge regarding anything of significance occurring on April 26. The employer alleges a time reporting irregularity on April 7, and provided written statements collected at least 11-12 days after the event, but failed to present any testimony from three coworkers who apparently had first-hand knowledge of the events of April 7. The employer did provide testimony from Ms. Neith regarding Ms. Karns' early departure from the Ankeny meeting on April 14, but provided no testimony from the employee who interacted with Ms. Karns at the store and brought the alleged irregularity to the attention of Ms. Neith.

What the administrative law judge is left with is several insufficiently corroborated allegations of misconduct. The employer had the ability and the obligation to support its argument that Ms. Karns was discharged for misconduct and has failed to do that. See 871 IAC 24.32(4). See also Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976). Based on the evidence in the record and application of the appropriate law cited above, the administrative law judge concludes that Ms. Karns was discharged for no disqualifying reason. Accordingly, Ms. Karns is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Karns.

DECISION:

The Agency representative's decision dated May 24, 2005, reference 01, 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 for benefits paid to the claimant.

jt/kjw