

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHERINE L HAYES
Claimant

APPEAL NO. 11A-UI-04244-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

DREAMS UNLIMITED INC
MOTEL 6 AVOCA
Employer

OC: 02/27/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Katherine Hayes filed a timely appeal from a representative's decision dated March 25, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a hearing was held in Council Bluffs, Iowa on May 26, 2011. Ms. Hayes participated personally. Participating as a witness was her mother, Mary Hayes. The employer participated by Mr. Keith Stoterau, Owner. Employer's Exhibits One through Four and Claimant's Exhibit A were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Katherine Hayes was employed by Motel 6 Avoca as a front desk worker and laundry assistant from April 3, 2008 until February 27, 2011 when the claimant was discharged from employment. Ms. Hayes was paid by the hour. Her immediate supervisor was the company owner, Keith Stoterau.

Ms. Hayes was discharged after she failed to report for an agreed-upon work assignment on Sunday, February 27, 2011. Ms. Hayes had previously specifically agreed to work the Sunday shift so that the company owner could travel to the state of South Dakota for a birthday celebration. A number of other individuals employed by the Motel 6 Avoca were aware that Ms. Hayes had been scheduled to work that day and had agreed to do so.

On or about Saturday, February 26, 2011, Mr. Stoterau stated some concern about weather conditions and his ability to travel to South Dakota because of them. Mr. Stoterau indicated that he would be making a decision on whether he would be able to travel to South Dakota as planned and the decision would be made Saturday evening, February 26, 2011 and that Ms. Hayes would be contacted by telephone to confirm the owner's travel plans for the next day.

Mr. Stoterau attempted on numerous occasions on the evening of February 26, 2011 to contact Ms. Hayes both by telephone and text message but Ms. Hayes did not respond to the calls or the messages. At 6:30 p.m. that evening Ms. Hayes telephoned her mother informing her mother that it would be unnecessary to utilize her services to babysit the next day.

The following morning, February 27, 2011, Mr. Stoterau again attempted to contact Ms. Hayes to inform her that travel plans were in place and that the claimant was expected to report for work as agreed. Ms. Hayes did not answer the call but subsequently returned Mr. Stoterau's call. During the conversation between the parties Ms. Hayes indicated that because she had not been called she no longer had babysitting arrangements and would not report for work as previously promised.

Because Ms. Hayes had missed work in the past and had been counseled by the employer about her undependability, a decision was made to terminate Ms. Hayes from her employment.

It is the claimant's position that when she was not called by the motel owner on the night of February 26, 2011 she concluded that her services were not needed and thus released her babysitter. The claimant was therefore unable to report for work because the employer had not called her to verify the need for Ms. Hayes to report the following day.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is.

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 insurance benefits. Misconduct that may be serious enough to warrant a discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

The evidence in this case is highly disputed. The administrative law judge having considered the evidence in the record at length concludes that the employer has sustained its burden of proof in establishing misconduct sufficient to disqualify the claimant from the receipt of unemployment insurance benefits.

Here the evidence in the record clearly establishes that Ms. Hayes had been instructed to report for a work shift on Sunday, February 27, 2011 and had unequivocally agreed to do so. The evidence further establishes that Ms. Hayes in the past had been absent and that the employer believed that a number of the claimant's absences were for non compelling reasons. The employer therefore counseled Ms. Hayes that her attendance and dependability were not acceptable.

In this case it is the claimant's position that she did not report on Sunday, February 27, 2011 because the employer had made her reporting for work that day contingent upon his travel plans that may have been changed. The administrative law judge notes that the evidence in the record establishes that the company owner indicated that he would contact the claimant on the evening of February 26, 2011 to verify that he was going out of town and Ms. Hayes would be expected to report for work as previously agreed upon by the parties. The company owner testified under oath that he repeatedly tried to contact the claimant by telephone and text messages but his attempts to contact the claimant went unheeded and unresponded to. The administrative law judge further notes that at 6:30 p.m. Ms. Hayes told her mother that the mother's services would not be needed the following day to babysit as no set time was agreed on between the parties for Mr. Stoterau to contact the claimant that evening. The administrative law judge finds the timing of the claimant's release of her babysitter to be of importance.

The administrative law judge concludes that the claimant's act of releasing her babysitter so early in the evening was not reasonable under the attendant circumstances of this case and showed an intention on the part of the claimant to provide an excuse not to report the next day as previously promised. Benefits are withheld.

DECISION:

The representative's decision dated March 25, 2011, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in

and been paid wages for insured work equal to ten times her weekly benefit amount and meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

css/css