

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HALLE F SIEMBIEDA
Claimant

APPEAL NO. 12A-UI-11718-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

OC: 08/26/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 19, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 26, 2012. Claimant Halle Siembieda participated. Tony Kerr of TALX/Equifax Workforce Solutions represented the employer and presented testimony through Nancy Webb and Lisa Lange. Exhibits One, Two, Three, Six, Seven and Eight were received into evidence.

ISSUE:

Whether Ms. Siembieda 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: Halle Siembieda was employed by WesleyLife as a full-time dietary aide from January 2011 until August 7, 2012, when Lisa Lange, Assistant Director of Dining Services, discharged her from the employment.

The incident that triggered the discharge occurred on August 5, 2012. On that day, Ms. Siembieda was scheduled to work from 6:00 a.m. to 6:00 p.m. At 10:00 a.m., Ms. Siembieda started a 30-minute unpaid break. Ms. Siembieda left the employer's campus. A short while later, supervisor Heather Frank received a telephone call from a Waukee police officer, who called to notify the employer that Ms. Siembieda has been issued a citation for possession of an open container of alcohol in a motor vehicle. Ms. Siembieda had also been cited at the same time for failure to provide proof of insurance. Ms. Frank forwarded the information she had received from the police officer to Aaron Wilcox, Executive Chef. When Ms. Siembieda returned to work after her break, Mr. Wilcox confronted Ms. Siembieda with the information he had received from Ms. Frank. Mr. Wilcox then contacted Lisa Lange, Assistant Director of Dining Services, who was at home at the time. When Mr. Wilcox questioned Ms. Siembieda, and again when Ms. Lange questioned Ms. Siembieda, Ms. Siembieda denied having been issued a citation for possession of an open container of alcohol in a motor vehicle. Ms. Siembieda offered to submit to a breath alcohol test, but the employer did not request a

breath alcohol test. Ms. Siembieda returned to work, but ended up voluntarily leaving around 1:39 p.m., before the end of her shift. Another employee sent a text message to notify Ms. Lange of Ms. Siembieda's early departure. Ms. Lange then telephoned Ms. Siembieda and requested that she meet with Ms. Lange on August 7. After August 5, Ms. Siembieda was next scheduled to work on August 7.

Ms. Siembieda appeared for her meeting with Ms. Lange at around 6:30 a.m. on August 7. Ms. Lange presented Ms. Siembieda with a corrective action for possession and consumption of alcohol while on duty. Ms. Siembieda provided Ms. Lange with two citations, one of which was for possessing an open container of alcohol in a motor vehicle. Ms. Siembieda admitted that she had consumed alcohol and had done so to "get the edge off."

The employer has a written drug and alcohol free workplace policy. The policy is contained in the January 2011 Team Handbook, which Ms. Siembieda received in February 2011. The policy states, in part, as follows:

Alcohol: Team Members may not work or report to work under the influence of alcohol or with a detectable level of alcohol (.04 grams per 210 liters of breath) in their system. Team members on call for WesleyLife should refrain from the use of alcohol while on call so as to prevent possible violations of these work rules if called in to report for duty.

Team members may not use, possess, or distribute alcohol while on WesleyLife property, operating WesleyLife equipment, machinery or vehicles or while performing business for WesleyLife.

Team members violating any of these provisions are subject to corrective action up to and including separation of employment event if it is the team member's first offense. Suspected violation of these provisions may also subject the team member to drug and/or alcohol testing under the procedures listed here. If a breath alcohol test is performed, discipline will be imposed as included in this procedure.

Ms. Siembieda had no prior reprimands.

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).

The weight evidence in the record establishes that Ms. Siembieda consumed alcohol while on a 30-minute, unpaid break. The weight of the evidence does not support Ms. Siembieda's assertion that the Waukee police officer's decision to cite her for possession of an open container of alcohol was based on an old empty can of beer that Ms. Siembieda missed when recycling empty cans. Reason, common sense, the fact that the citation was issued, and Ms. Siembieda's August 7 admission to the employer, lead to the conclusion that Ms. Siembieda did indeed imbibe alcohol while on her break. While Ms. Siembieda was not clocked in, that fact that Ms. Siembieda was on a short break in the midst of her work shift provides a sufficient nexus with the employment. Though Ms. Siembieda was on an unpaid break, she was in the midst of performing work for the employer on either side of the break and her consumption of alcohol while on break violated the employer's written policy. Not only did Ms. Siembieda violate the employer's policy, but she also committed a criminal offense while on her break. The weight of the evidence indicates that Ms. Siembieda initially untruthfully denied to the management members that she had been consuming alcohol on break. That dishonesty added to the misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Siembieda was discharged for misconduct. Accordingly, Ms. Siembieda is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Siembieda.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

DECISION:

The Agency representative's September 19, 2012, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 allowance, provided she meets all other eligibility requirements. The employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css