

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

ALAINA D GARRETT
125 TAFT CIR
OTTUMWA IA 52501-1562

KUM & GO LC
c/o FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-04895-JTT
OC: 04/09/06 R: 03
Claimant: Respondent (2)

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
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Kum & Go filed a timely appeal from the April 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 23, 2006. Claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Mary Beth Van Mannen represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alaina Garrett was employed by Kum & Go as a full-time sales manager from May 1, 2004 until April 9, 2006, when General Manager Mary Beth Van Mannen discharged her for excessive unexcused tardiness. The final tardiness that prompted the discharge occurred on April 6, 2006, and came

to the attention of Ms. Van Mannen on April 9, when she returned from vacation. Ms. Garrett did not provide a reason for the tardiness. In January, Ms. Garrett had been tardy ten times. In February, Ms. Garrett had been tardy seven times. In March, Ms. Garrett was tardy on the 9th, 10th, 11th, and 12th. Ms. Garrett had a similar pattern of tardiness in 2005. For each of the instances of tardiness, Ms. Garrett either provided no excuse or indicated she had simply been running late. In October, Ms. Van Mannen issued a verbal reprimand to Ms. Garrett. In November, Ms. Van Mannen issued a written warning to Ms. Garrett. Four or five months before Ms. Garrett was discharged, Ms. Van Mannen instituted a formal notification policy that required employees to contact the convenience store at least an hour before the scheduled start of their shift if they needed to be absent. Ms. Van Mannen reviewed the policy with Ms. Garrett and had Ms. Garrett initial the policy. When Ms. Garrett's pattern of tardiness extended into March, Ms. Van Mannen told Ms. Garrett that she would lose one shift per week for each subsequent instance of unexcused tardiness. Ms. Garrett complained to the Area Supervisor. On March 26, the Area Supervisor directed Ms. Van Mannen to discharge Ms. Garrett upon the next instance of tardiness, which subsequently occurred on April 6.

Ms. Garrett established a claim for benefits that was effective April 9, 2005, and has received benefits totaling \$1,050.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Garrett was discharged for misconduct in connection with the employment. It does.

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 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 order for Ms. Garrett's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *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).

The evidence in the record establishes that Ms. Garrett's final tardiness on April 6 was unexcused. The evidence further establishes that Ms. Garrett's unexcused tardiness was excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Garrett was discharged for misconduct. Accordingly, Ms. Garrett 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. Garrett.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be

credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Ms. Garrett received benefits for which she had been deemed ineligible, the benefits she had received constitute an overpayment that Ms. Garrett must repay to Iowa Workforce Development. Ms. Garrett is overpaid \$840.00.

DECISION:

The Agency representative's decision dated April 27, 2006, reference 01, 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 will not be charged. The claimant is overpaid \$1,050.00.

jt/kkf