

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELSEY N ELIAS
Claimant

APPEAL NO. 16A-UI-05916-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DRM INC
Employer

OC: 05/01/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Kelsey Elias filed a timely appeal from the May 19, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Ms. Elias had been discharged for misconduct in connection with the employment. After due notice was issued, a hearing was held on June 13, 2016. Ms. Elias participated. Michele Hawkins of Equifax represented the employer and presented testimony through Stephanie Gould and Julie Showers. Exhibits One through Nine were received into evidence

ISSUE:

Whether the claimant 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: Kelsey Elias was employed by DRM, Inc., d/b/a Arby's, from February 2014 until May 3, 2016, when the employer discharged her from the employment. The discharge was based primarily on attendance. From November 2014 until the end of the employment, Ms. Elias worked as a full-time Assistant Manager at the employer's Indianola restaurant. Stephanie Gould, Unit Manager, was Ms. Elias' immediate supervisor from February 2015 onward.

The final incident that triggered the discharge occurred on April 28, 2016, when Ms. Elias was late for her 11:30 a.m. shift. Ms. Elias overslept. The scheduled shift was part of the work schedule that was posted two weeks earlier. Ms. Elias appeared for work at 12:45 p.m.

The late arrival on April 28 followed consecutive late arrivals for 11:30 a.m. shifts on March 4 and March 5, 2016. Those two scheduled shifts were part of the work schedule that was posted two weeks earlier. When Ms. Elias did not appear on time for her March 4 shift, the employer contacted her. At that time, Ms. Elias indicated that she thought she had been scheduled for a closing shift on that day. Ms. Elias appeared at the workplace at 2:30 p.m. and stayed late. Ms. Elias did not check her work schedule. When Ms. Elias did not appear on time for her shift

on March 5, the employer contacted her and Ms. Elias once again advised that she had thought she was scheduled to work closing shift that day. After the consecutive late arrivals in March, Ms. Gould issued a written reprimand to Mr. Elias in which she warned that future violations of company policy or procedures would result in further discipline up to and including termination of the employment.

Ms. Elias was sometimes scheduled to work midday shifts after working closing shifts the previous evening. The latest she would have to work as part of a closing shift was 1:00 a.m. One or more of the three late arrivals that factored in the discharge may have followed immediately after Ms. Elias worked a closing shift. Such scheduling was a routine part of the employment.

In making the decision to discharge Ms. Elias from the employment, the employer also considered Ms. Elias' conduct in connection with an April 17, 2016 shift. During that shift, Ms. Elias left two new employees alone in the restaurant, while she and another employee stepped outside to smoke a cigarette. One of the new employees left in the restaurant alone had been with the company for two weeks. The other new employee was on their first day. Ms. Elias knew that she was not supposed to leave the new employees unsupervised in the restaurant. At the end of the April 17 shift, Ms. Elias failed to recount inventory to correct erroneous inventory information she had entered into the employer's computer system. The computer system highlighted the erroneous information to bring the errors to Ms. Elias' attention. Ms. Elias was aware of her duty to fix the inventory variances and was aware of the easy steps involved in doing so but did not fix the inventory information before she left for the day. In response to the issues with the April 17 shift, Ms. Gould issued two written reprimands to Ms. Elias. In addition, Ms. Gould had Ms. Elias sign the Assistant Manager and Shift Manager duty descriptions.

The employer has an employee handbook that the employer reviewed with Ms. Elias at the start of the employment. The handbook contained an attendance policy. The attendance policy stressed the importance of appearing for work on time. As an Assistant Manager, Ms. Elias supervised other employees and was responsible for enforcing the policies contained in the employee handbook, including the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 conduct in connection with the employment based on excessive unexcused absences and based on a pattern of negligence. On March 4, March 5, and April 28, 2016, Ms. Elias appeared late for scheduled 11:30 a.m. shifts. In the first two instances, she failed to review the posted schedule to see that she was scheduled to work at 11:30 a.m. In the final instance, she slept through her alarm and appeared late for another 11:30 a.m. shift. Even if Ms. Elias had worked until 1:00 a.m. the night before any one of the three late arrivals, that fact did nothing to mitigate the unexcused tardiness for shifts that were scheduled to start ten and one-half hours later. Ms. Elias acknowledges that it was more egregious for a manager to appear for work late than it would be for a rank-and-file crew member to appear for work late. Her late arrivals did more to interfere with restaurant operations. In addition, her late arrivals set a poor example that undermined the employer's effort to enforce the attendance policy. These three late arrivals, and the particular circumstances under which they occurred, each was an instance ordinary negligence. These instances of negligence, coupled with the negligent conduct during the April 17 shift, were sufficient to demonstrate a substantial disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Elias was discharged for misconduct. Accordingly, Ms. Elias 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. Elias must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The May 19, 2016, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance. The claimant must meet all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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