

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAWN O TIBBOTT**  
Claimant

**APPEAL NO. 07A-UI-06201-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KRAUS, WILLIAM M**  
**KRAUS CONSTRUCTION**  
Employer

**OC: 05/27/07 R: 04**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

Kraus Construction filed a timely appeal from the June 18, 2007, reference 01, decision that allowed benefits. After due notice was issued, an in-person hearing was held on July 26, 2007. Claimant Dawn Tibbott participated. Kathy Krause, co-owner, represented the employer and presented additional testimony through co-owner William Kraus. The administrative law judge took official notice of the Agency's record of benefits paid to the claimant and received Exhibits Two, Three, Four and A into evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment, based on excessive unexcused absences, that disqualifies her for unemployment insurance benefits.

Whether the claimant has been overpaid benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Dawn Tibbott was employed by Kraus Construction as a part-time laborer from August 14, 2006 until May 26, 2007, when co-owner William Kraus discharged her for attendance. Though Kraus Construction was the employer of record for unemployment insurance purposes, Ms. Tibbott actually worked for a separate dog breeding and kennel business operated by Kathy Kraus. The Kraus' son is Ms. Tibbott's former boyfriend and the father of Ms. Tibbott's son. During Ms. Tibbott's employment, Ms. Tibbott was a full-time college student. Ms. Tibbott's work schedule changed on more than one occasion due to a change in Ms. Tibbott's school schedule.

The final absence that prompted the discharge occurred on Saturday, May 26, 2007, when Ms. Tibbott failed to appear for a scheduled Saturday morning shift because she overslept. Ms. Tibbott's scheduled start time was 7:30-8:00 a.m. Saturdays were the employer's busiest day because of the number of customers present. At 8:30 a.m., when Ms. Tibbott still had not

appeared for work, Mr. Kraus telephoned Ms. Tibbott and left a message. At 8:45 a.m., Ms. Tibbott called back and Mr. Kraus discharged Ms. Tibbott from the employment.

Ms. Tibbott was frequently tardy for her weekend shifts. On March 10, Ms. Tibbott did not appear for work until 9:45 a.m., at which time Mrs. Kraus sent her home as a disciplinary measure. Thereafter, Ms. Tibbott was tardy for personal reasons on Sunday, March 11, Sunday, March 18, Sunday, March 25, Saturday, March 31, Saturday, April 7, Sunday, April 8, Saturday, May 12 and Sunday, May 13.

Ms. Tibbott was also frequently tardy for her weekday shifts. Ms. Tibbott and Mrs. Kraus had an agreement at the start of the employment that Ms. Tibbott could be late for a weekday shift if she needed to stay at school. Ms. Tibbott continued to function under the belief that it was okay to be late for weekday shifts if her school duties required. Ms. Tibbot and Mrs. Kraus agreed to a new work schedule to go into effect on March 14, 2007. Under the new schedule, Ms. Tibbot was to commence work between 2:00 p.m. and 2:30 p.m. on Monday, Wednesday and Friday. On the day the schedule went into effect, Ms. Tibbot did not appear until 4:30 p.m. Thereafter, Ms. Tibbot was tardy for a weekday shift for personal reasons on March 16, 19, 21, 23, April 2, 6, 10, 12, 24, 25, and May 3.

Ms. Tibbott established a claim for benefits that was effective May 27, 2007 and has received benefits totaling \$974.00.

#### **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).

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 that Ms. Tibbott's final absence on Saturday, May 26 was due to Ms. Tibbott oversleeping and, therefore, was an unexcused absence under the applicable law. The evidence further establishes that Ms. Tibbott's other instances of weekend tardiness each were an unexcused absence under the applicable law. Without giving any weight whatsoever to the weekday tardiness, the evidence in the record establishes that Ms. Tibbott's unexcused weekend tardiness was excessive. The evidence indicates that the employer had in fact notified Ms. Tibbott on March 10 that the weekend tardiness was unacceptable and had sent Ms. Tibbott home in response to a late arrival.

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

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. Tibbott has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment that Ms. Tibbott must repay to Iowa Workforce Development. Ms. Tibbott is overpaid \$974.00.

**DECISION:**

The claims representative's June 18, 2007, 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 will not be charged. The claimant is overpaid \$974.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs