

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALEXANDRA V HARRINGTON
Claimant

APPEAL NO. 06A-UI-10670-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

**OC: 10/01/06 R: 02
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

Kinseth Hotel Corporation filed a timely appeal from the October 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 20, 2006. Claimant Alexandra Harrington participated. Rachel Thompson of Unemployment Services/TALX UC eXpress represented the employer and presented testimony through Steve Peters, Traveling General Manager with Kinseth Corporation, and Carmen Caffrey, Bookkeeper for the Des Moines Four Points Sheraton and Bennigan's. Upon the claimant's request, the administrative law judge took official notice of the Agency's administrative file, including documents relating to the fact-finding interview. Both parties were provided with a copy of the administrative file prior to the hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. She was not.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Alexandra Harrington was employed by Kinseth Hotel Corporation as a full-time front desk clerk at the Four Points Sheraton from December 8, 2004 until September 22, 2006, when Steve Peters, Traveling General Manager with Kinseth Corporation, discharged her.

The final incident that prompted the discharge occurred on September 16, 2006. On that day, Ms. Harrington was scheduled to work from 10:00 a.m. to 6:00 p.m. Another employee had come on duty at the front desk at 7:00 a.m. and was scheduled to leave at 3:00 p.m. An additional employee, Mary, was scheduled to work at the front desk from 3:00 to 11:00 p.m. Between 10:00 a.m. and noon on September 16, Ms. Harrington telephoned Mr. Peters to ask whether she could leave work because business was slow.

The level of business at the front desk was directly related to the number of guests scheduled to arrive and depart the hotel. The schedule for the week in question indicates that on September 16 there were 40 guests scheduled to arrive and 25 guests scheduled to check out.

The schedule indicates that this level of front desk business was significantly lower than the previous day, when 108 guests were scheduled to arrive and 45 were scheduled to leave. Mr. Peters denied Ms. Harrington's request to leave work. At some point later in the shift, Ms. Harrington telephoned Bookkeeper Carmen Caffrey in connection with a matter concerning a guest. During the call, Ms. Harrington referenced that she was bored, that she had contacted Mr. Peters, and that Mr. Peters had denied her request to leave.

Though Ms. Harrington was scheduled to work until 6:00 p.m., the time card record indicates that Ms. Harrington clocked out at 3:36 p.m. Ms. Harrington's coworker, Mary, continued to staff the front desk. At some point after Ms. Harrington left, a customer complained about having to wait to check in and the complaint was forwarded to Mr. Peters. At that time, Mr. Peters learned that Ms. Harrington had left work before the scheduled end of her shift. Mr. Peters considered Ms. Harrington's early departure insubordination. On September 22, Mr. Peters summoned Ms. Harrington to a meeting and discharged her from the employment.

Two weeks before the discharge, the employer had implemented a staffing policy whereby front desk employees could decide amongst themselves, without seeking management approval, to have a front desk clerk leave before the scheduled end of his/her shift if the level of business did not warrant having two employees on duty. The purpose of the policy was to reduce labor costs. Based on this new policy, Ms. Harrington did not believe she needed Mr. Peters' permission to leave early if she was leaving towards the end of her shift, as opposed to the beginning of her shift. Ms. Harrington recognized that her desire to leave at the beginning of her shift presented a different situation and this is why she telephoned Mr. Peters to request to leave at the beginning of her shift.

Ms. Harrington has ongoing health issues related to a motor vehicle accident in 2004 and injury to Ms. Harrington's neck and back. The employer knew about Ms. Harrington's health condition. The employer did not schedule Ms. Harrington to work on Tuesdays because this was the day Ms. Harrington received therapy for her neck and/or back. Ms. Harrington did not mention her health condition on September 16 at the time she spoke to Mr. Peters or Ms. Caffrey.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Harrington was discharged for misconduct in connection with the employment that disqualifies her for unemployment insurance benefits. It does not.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

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 this matter, the administrative law judge is confronted with two parties that both appear to be overstating their side of the case. The claimant asserts she left early due to illness, but the weight of the evidence does not support that assertion. The claimant asserts that she left one and a half hours early, at 4:30 or 4:40 p.m., when the time card record indicates she left an hour earlier. The employer asserts that Ms. Harrington's departure created a hardship, but presented no testimony from Mary, the front desk clerk who continued to staff the front desk after Ms. Harrington's early departure. The employer asserts September 16 was expected to be a busy day, but the employer's staffing schedule contradicts this.

The evidence in the record indicates that Ms. Harrington left well before the end of her shift, that she left at what would have been the busiest time of day, and that she left without permission. The early departure was an unexcused absence. However, a single unexcused absence does not constitute misconduct that would disqualify a person for unemployment insurance benefits. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

The evidence in the record indicates that the employer denied Ms. Harrington's request to leave early. The employer's denial of Ms. Harrington's request to leave early in her shift and prior to the busiest part of the day was reasonable. The evidence indicates that Ms. Harrington's departure at 3:36 p.m., at the busiest part of the day, was not reasonable. Ms. Harrington had sufficient familiarity with the employer's business to know that she was leaving at the busiest part of the day. The greater weight of the evidence does not support Ms. Harrington's assertion that she left early due to illness. The greater weight of the evidence also does not support the employer's assertion that the early departure left the employer in a serious bind. Most importantly, the evidence indicates that Ms. Harrington's early departure without permission on September 16 was an isolated occurrence and not part of an ongoing refusal to follow the employer's directives. In other words, the evidence does not establish ongoing insubordination such as existed in the Gilliam case. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

Though the decision to discharge Ms. Harrington was within the discretion of the employer, the administrative law judge concludes that Ms. Harrington was not discharged for substantial misconduct that would disqualify her for unemployment insurance benefits. Accordingly, Ms. Harrington is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Harrington.

DECISION:

The Agency representative's October 27, 2006, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs