

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAMMY J DUBOIS**  
Claimant

**APPEAL NO. 13A-UI-09762-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERICAN GAMES INC**  
Employer

**OC: 07/28/13**  
**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 August 16, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 27, 2013. Claimant Tammy Dubois participated and presented additional testimony through Tony Dubois. Tom Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through Jennifer Paisley, Phil Van Ommeren, and Tom Adams. Exhibits One through Six 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: Tammy Dubois was employed by American Games, Inc., as a full-time line production worker from 2004 until July 29, 2013, when Phil Van Ommeren, Second Shift Bingo Supervisor, and Tom Adams, Bingo Production Manager, discharged her for attendance. Ms. Dubois' work hours were 2:00 p.m. to 10:00 p.m. The employer's established work rules allowed Ms. Dubois to clock in for work as early as five minutes before the scheduled start of her shift, but required that she be clocked in by the scheduled start time. The employer's written attendance policy explicitly stated that if an employee clocked in one minute late, the employee would be deemed tardy. Ms. Dubois was aware of these work rules. Ms. Dubois was also aware that if she arrived for work late, someone else would have to perform her line production duties until she arrived. To clock in Ms. Dubois would have to enter a short code into the time clock.

Ms. Dubois was habitually late for work. Ms. Dubois lived about 2.5 miles from the workplace. Ms. Dubois lived near railroad tracks for several years during the employment. The trains were not the reason Ms. Dubois was habitually late, often by just one minute. In 2013, Ms. Dubois was late for personal reasons on March 13, April 1 and 18, June 24 and 25, and July 22 and 29.

On the first two dates, Ms. Dubois was seven minutes late. On the final five dates, Ms. Dubois was one minute late. Ms. Dubois received three reprimands for attendance in 2012 and one more in March 2013.

### **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).

Ms. Dubois' absences on March 13, April 1 and 18, June 24 and 25, and July 22 and 29 were each unexcused absences under the applicable law. The weight of the evidence establishes that each mentioned absence was attributable to Ms. Dubois simply running late. There is insufficient evidence to establish that any of the mentioned absences was due to Ms. Dubois being blocked by a train or otherwise delayed for unusual traffic. Ms. Dubois' unexcused absences were excessive and constituted misconduct in connection with the employment. Ms. Dubois 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 unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

**DECISION:**

The agency representative's August 16, 2013, 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 for benefits paid beyond the date of this decision.

This matter is **remanded** to the Claims Division for determination of the employer's liability for benefits up to the date of this decision and for determination of whether the claimant is required to repay the benefits she has received.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs