

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE R SONDERLEITER**  
Claimant

**APPEAL NO: 06A-UI-08465-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARRIOTT HOTEL SERVICES INC**  
Employer

**OC: 07/16/06 R: 02  
Claimant: Respondent (2)**

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Section 96.5(2)(a) – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absences  
Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

Marriott Hotel Services filed a timely appeal from the August 11, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 7, 2006. Claimant Michelle Sonderleiter did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Senior Assistant Controller Diane De Kruffy represented the employer. Employer's Exhibits One through Six were received into evidence.

**ISSUE:**

Whether Ms. Sonderleiter was discharged for misconduct based on excessive unexcused absences and, therefore, is disqualified for unemployment insurance benefits. She was.

Whether Ms. Sonderleiter has been overpaid unemployment insurance benefits. She has.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle Sonderleiter was employed by the Marriott Hotel in Des Moines as a full-time front desk clerk from August 10, 2005 until April 12, 2006, when General Manager Jeff Hilt suspended her and then discharged her for attendance. Ms. Sonderleiter's immediate supervisor was Front Desk Manager Dan Frost. The final absence that prompted the discharge occurred on April 10, 2006, when Ms. Sonderleiter was tardy. Ms. Sonderleiter had not notified the employer that she would be late for work. The employer's written attendance policy required Ms. Sonderleiter to notify the employer at least one hour in advance of the scheduled start of her shift if she needed to be late. Ms. Sonderleiter was aware of the policy and had signed her acknowledgment of the policy on August 10, 2005. Ms. Sonderleiter has also been tardy for personal reasons on September 21, August 8, December 1, 2, 12, 15, 19, January 11, and February 6, 9, and 27. Ms. Sonderleiter had also called in absences on October 10, 2005 and March 21, 2006, but the employer representative did not have access to the employer's attendance calendar at the time

of the hearing and could not testify to the reason for the absences or when Ms. Sonderleiter notified the employer. The employer issued formal reprimands regarding attendance to Ms. Sonderleiter on October 12, December 27, and February 10. Ms. Sonderleiter initialed and signed each reprimand and declined to provide responses in the space provided for her response.

Prior to recommending to the Human Resources Manager that Ms. Sonderleiter be discharged, General Manager Jeff Hilt met with Ms. Sonderleiter on April 12 to impose a disciplinary suspension. At that time, Ms. Sonderleiter indicated that her responsibilities as single parent of three children interfered with her ability to get to work on time.

Ms. Sonderleiter established a claim for benefits that was effective July 16, 2006 and has received benefits.

### **REASONING AND CONCLUSIONS OF LAW:**

The question is whether the evidence in the record establishes that Ms. Sonderleiter 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.

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).

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 Ms. Sonderleiter'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 the final tardiness on April 10, 2006, was unexcused. The evidence further establishes a pattern of unexcused tardiness was excessive. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Sonderleiter was discharged for misconduct. Accordingly, Ms. Sonderleiter 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. Sonderleiter.

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. Sonderleiter has received benefits for which she has been deemed ineligible, those benefits constitute an overpayment Ms. Sonderleiter must repay to Iowa Workforce Development. Ms. Sonderleiter is overpaid \$1,366.00.

**DECISION:**

The Agency representative's August 11, 2006, 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 \$1,366.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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