

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDITH A KRESS
Claimant

APPEAL NO. 12A-UI-06007-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PLATINUM HOLDINGS LLC
GRAND HARBOR RESORT & WATERPARK
Employer

OC: 04/29/12
Claimant: Respondent (4)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.4(3) – Able & Available
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 17, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 5, 2012. Claimant Judith Kress was not at the telephone number she had provided for the hearing and did not participate. Ms. Kress submitted a letter prior to the hearing indicating that she would not be participating. Alicia Fricke, Executive Assistant, represented the employer. Exhibits One and A were received into evidence. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been able to work and available for work since she established her claim for 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: Judith Kress was employed by Platinum Holdings, L.L.C., doing business as Grand Harbor Resort & Waterpark as a part-time housekeeper from 2010 until April 18, 2012, when Robin Marcus, Executive Housekeeper, discharged her for attendance. Ms. Marcus was Ms. Kress' immediate supervisor. Ms. Kress' start time was 9:00 a.m.

The absence that triggered the discharge occurred on April 18, 2012. On April 17, Ms. Kress notified Ms. Marcus that she would need to be absent due to illness on April 18. The employer did not have any reason to believe that Ms. Kress was not ill. Ms. Marcus reminded Ms. Kress

that this would be her eighth absence in a year and would subject her to discharge from the employment. Ms. Marcus told Ms. Kress that if she did not appear for the shift, she was discharged from the employment. Ms. Kress did not appear for the shift and the employer discharged her from the employment.

The employer's absence reporting policy required that Ms. Kress notify her manager or supervisor at least two hours prior to the scheduled start of her shift. The policy also subjected employees to discharge from the employment if they were absent eight times in a year. The policy was contained in the handbook provided to Ms. Kress.

In making the decision to discharge Ms. Kress from the employment, the employer also considered prior absences. The next most recent absence had been on March 26, when Ms. Kress was absent because she thought her dog was about to give birth and wanted to remain with the dog. Ms. Kress was absent on March 16 with proper notice because she was out of a prescription medication. Ms. Kress had spoken to a supervisor a few days earlier about her situation. Ms. Kress shared that she had not used the medication as directed and that the doctor would not prescribe additional medication so soon. On March 11, Ms. Kress was absent with proper notice due to illness. Ms. Kress went to the emergency room that day and provided the employer with a doctor's note. On January 16, Ms. Kress was absent with proper notice due to illness because of a foot ailment. Ms. Kress had recently undergone surgery for her foot. Ms. Kress provided the employer with a doctor's note that took her off work until January 20, 2012. Ms. Kress had been absent from the employment with proper notice from September 22, 2011 until January 2012. Ms. Kress was absent during that time due to a foot injury, necessary surgery, and recover from the surgery. July 7, 2011, Ms. Kress was absent for personal reasons. On May 20, Ms. Kress was absent with proper notice because she needed to appear for her final gambling addiction counseling session.

The employer had issued two warnings to Ms. Kress for attendance. The most recent warning was issued on March 26, 2012 to let Ms. Kress know that she had seven absences within the prior year and would be subject to discharge if she had another absence.

Ms. Kress established a claim for unemployment insurance benefits that was effective April 29, 2012 and continued the claim for three weeks, through the week that ended May 19, 2012. For those three weeks, Ms. Kress received \$450.00 in unemployment insurance benefits. On May 21, 2012, Ms. Kress commenced new employment and discontinued her claim.

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). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in

connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record fails to establish misconduct in connection with the employment because the last absence that triggered the discharge, the absence on April 18, was due to illness properly reported to the employer and, therefore, was an excused absence under the applicable law. Because it was an excused absence, it cannot be used as a basis for a finding of misconduct or disqualifying Ms. Kress for unemployment insurance benefits. The next most recent absence had been on March 26. That was 23 days prior to the final absence that triggered the discharge. While the March 26 absence was an unexcused absence under the applicable law, it did not constitute a "current act" at the time of the discharge. In the absence of a current act of misconduct, the administrative law judge must conclude that Ms. Kress was discharged for no disqualifying reason. Accordingly, Ms. Kress would be eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Kress.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a and (2) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required

to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

As indicated above, 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). Ms. Kress had the burden of proving that she was able to work and available for work during each week for which she claimed benefits. Ms. Kress has presented no evidence concerning her ability to work or her availability for work during the three-week period of April 29, 2012 through May 19, 2012. These were the weeks for which Ms. Kress claimed unemployment insurance benefits. Because Ms. Kress has presented no evidence to prove she was both able to work and available for work during this three-week period, the administrative law judge concludes that Ms. Kress did not meet the able and available requirement during those weeks and is not eligible for benefits for those weeks.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because Ms. Kress received \$450.00 in benefits for three-week period of April 29, 2012 through May 19, 2012, and because she has failed to present evidence to demonstrate that she was able to work and available for work during that period, she was not eligible for benefits for that three-week period. The \$450.00 in benefits constitutes an overpayment. Ms. Kress must repay that amount.

DECISION:

The Agency representative's May 17, 2012, reference 01, decision is modified as follows. The claimant was discharged for no disqualifying reason. The claimant would be eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged. The claimant did not demonstrate that she was able to work and available for work during the three-week period of April 29, 2012 through May 19, 2012 and is not eligible for benefits for those weeks. The claimant is overpaid \$450.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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