

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TORI R SLEETH**  
Claimant

**APPEAL NO. 12A-UI-14939-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMMERCIAL RESOURCES INC**  
Employer

**OC: 11/11/12  
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 December 13, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 23, 2013. Claimant Tori Raelynn Sleeth participated. Rachel Hoffman represented the employer and presented testimony through Denise McClain and Cortney O'Connor. Exhibits One through Nine were received into evidence.

**ISSUE:**

Whether Ms. Sleeth 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: Tori Raelynn Sleeth was employed by Commercial Resources, Inc., as a part-time cook/dietary aide in a nursing home facility from September 2011 until November 15, 2012, when Denise McClain, Dietary Supervisor, discharged her from the employment. Ms. McClain was Ms. Sleeth's immediate supervisor. Ms. McClain discharged Ms. Sleeth from the employment due to Ms. Sleeth's repeated failure to complete cleaning duties and prep work, due to Ms. Sleeth signing off that she had done such work when she had not, due to preparing food in unsanitary conditions, due to Ms. Sleeth not putting groceries away, and due to alleged rudeness directed at other staff members.

The final incident that triggered the discharge came to Ms. McClain's attention on November 15, 2012, when she arrived for work at 8:00 a.m. At that time, Ms. McClain observed that the kitchen floor was dirty, that there was food waste on the tables and the floor, and that Ms. Sleeth had not completed the necessary prep work. Ms. McClain had noted several days of the prep work not being completed and several days of Ms. Sleeth not completing the cleaning lists but signing off as if she had.

The discharge followed several similar reprimands that Ms. McClain issued to Ms. Sleeth. Ms. Sleeth had the ability to complete her duties in a satisfactory manner. Ms. Sleeth would not

complete her assigned work, but would find time to take hourly, sometimes extended, smoke breaks. Ms. Sleeth was allowed one 10-minute break during her six-hour shift. Ms. McClain had approved brief, additional smoke breaks on the condition that Ms. Sleeth was caught up on her work. Ms. Sleeth took the hourly smoke breaks regardless of whether she was caught up on her work.

On December 21, 2011, Ms. McClain issued a reprimand to Ms. Sleeth in connection with incidents on December 12 and December 18. On December 12, Ms. Sleeth signed off on the checklist indicating that the kitchen was ready for the next shift when it was not ready. Ms. Sleeth had not cleaned the steam table and had left dirty pans. In addition, Ms. Sleeth had not filled a butter container. On December 18, Ms. Sleeth had left a grill on all night.

On February 8, 2012, Ms. McClain issued a reprimand to Ms. Sleeth after Ms. McClain received reports that Ms. Sleeth was touching food with her bare hands in violation of sanitation requirements. Ms. Sleeth had indeed been touching the food with her bare hands. The employer's policies required that she wear gloves or use tongs to pick up food. Ms. Sleeth was aware of these requirements, but sometimes did not follow them.

On March 26, Ms. McClain issued a written reprimand to Ms. Sleeth after she observed a mess in the kitchen upon her arrival that morning. Ms. Sleeth had used a handwashing sink to rinse spinach, had left macaroni in the double sink, had failed to clean the steam table and prep table, and had put away dirty dishes and silverware as if they were clean. Ms. McClain warned Ms. Sleeth that the next time such conduct occurred, Ms. Sleeth would be placed on an unpaid suspension. Ms. Sleeth had notified Ms. McClain during the shift that she did not feel well. Ms. Sleeth had an infected jaw and felt like she was having an adverse reaction to an antibiotic.

On May 28, 2012, a charge nurse had issued a corrective action to Ms. Sleeth after Ms. Sleeth and another coworker failed to respond to a resident use of the doorbell to gain access to the facility. Ms. Sleeth and the coworker had been working in the area and had decided they were too busy to answer the door to let resident back in to the facility.

On June 4, 2012, Ms. McClain issued a written reprimand to Ms. Sleeth after she discovered a mess in the kitchen upon her arrival from work that morning. Ms. Sleeth had not swept or mopped the floor. Ms. Sleeth had left three pans unwashed, had left the grill dirty, had left the outside of the dishwasher dirty with splattered food, and had left tables in the dining room dirty. Ms. Sleeth had left food in the three-compartment sink. Ms. McClain also discovered that Ms. Sleeth and others had accessed Facebook using Ms. McClain's office computer during the shift when Ms. Sleeth left work undone. Ms. McClain placed Ms. Sleeth on a three-day suspension without pay. Ms. McClain placed Ms. Sleeth on a 90-day probationary period and warned that if similar conduct continued, Ms. Sleeth would be terminated from the employment. Ms. McClain also warned that another incident of accessing Facebook from the work computer would result in termination of the employment.

On November 6, 2012, Ms. McClain issued a written reprimand to Ms. Sleeth based on the condition of the kitchen when Ms. McClain arrived for work on October 31. Ms. McClain had discovered empty boxes scattered on the floor and that the floor had not been swept or mopped. Ms. Sleeth had failed to complete the prep list and cleaning list. Ms. Sleeth had taken multiple smoke breaks during the shift instead of performing her duties. Ms. McClain warned Ms. Sleeth that the next such incident would result in termination of employment. The final incident followed about a week later.

## 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).

The employer has presented sufficient evidence to establish a pattern of negligence indicating a willful disregard of the employer's interests. The employer's interests included both timely and satisfactory completion of work duties. Ms. Sleeth had the ability, but just did not care enough about completing her duties. Ms. Sleeth would prioritize her smoke breaks even if that meant leaving work undone. Ms. Sleeth would document that she had performed work that she had not. Each of the incidents referenced in the findings of fact involved negligence on the part of Ms. Sleeth when she had the ability to perform her work. With regard to the March incident, even if one accounts for Ms. Sleeth not feeling her best, that does not fully explain the mess the employer found the next morning.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

**DECISION:**

The Agency representative's December 13, 2012, 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.

This matter is remanded to the Claims Division for determination of the amount of the overpayment and whether the claimant will have to repay the overpaid benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs