

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE M MCKIM**  
Claimant

**APPEAL NO. 11A-UI-05867-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KUM & GO LC**  
Employer

**OC: 03/27/11**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 18, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 26, 2011. Claimant Michelle McKim participated. Joel Kaasa, Sales Supervisor, represented the employer.

**ISSUE:**

Whether Ms. McKim separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Michelle McKim was employed by Kum & Go as a full-time sales manager (assistant manager) until March 25, 2011, when Joel Kaasa, Sales Supervisor, suspended her from the employment for theft. On March 10, 2011, Garner police interviewed Ms. McKim with regard to six separate gas drive-offs from the Kum & Go store in Garner. On March 22, 2011, Garner police charged Ms. McKim with six counts of Theft in the Fifth Degree in connection with the gas drive-offs. Mr. Kaasa supervised 15 stores, including the Algona store where Ms. McKim worked at up to the time of the suspension. Mr. Kaasa reviewed surveillance video concerning the Garner Kum & Go gas drive-offs. The video surveillance showed Ms. McKim's car, including her license plate.

At the time Mr. Kaasa suspended Ms. McKim he told her that she was being suspended pending the outcome of the criminal prosecution and that it would be hard for her to continue in the employment if she were found guilty.

Ms. McKim established a claim for unemployment insurance benefits that was effective March 27, 2011 in response to the suspension.

On April 1, 2011, Ms. McKim submitted a written resignation by e-mail, ostensibly so that she could obtain her Christmas bonus money. Mr. Kaasa did not receive the e-mail. On April 21, 2011, Ms. McKim submitted a hardcopy resignation, again, ostensibly so that she could get her

Christmas bonus money. On April 18, 2011, Ms. McKim had accepted a plea bargain under which she pleaded guilty that day to one count of Theft in the Fifth Degree and the remaining five counts were dismissed.

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

Iowa Code § 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 § 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).

Iowa Administrative Code section 871 IAC 24.32(9) provides as follows:

*Suspension or disciplinary layoff.* Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer had sufficient evidence at the time of the March 25, 2011 suspension to establish, by a preponderance of the evidence, that Ms. McKim had indeed stolen gas from its Garner store on six separate occasions. Ms. McKim's testimony that these six instances were based on gasoline pump failure is not credible. Ms. McKim's theft from the employer, albeit from the employer's Garner store, was in willful and wanton disregard of the employer's interest and constituted misconduct in connection with the employment that disqualifies her for unemployment insurance benefits.

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

Iowa Code § 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 § 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 whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The Agency representative's April 18, 2011, reference 01, decision is reversed. The claimant was effectively discharged for misconduct through the March 25, 2011 suspension. 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 whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs