

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DZENIFA KOSTIC**  
Claimant

**APPEAL NO. 15A-UI-12710-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SHARPNESS INC**  
Employer

**OC: 10/25/15**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

Dzenifa Kostic filed a timely appeal from the November 13, 2015, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits; based on an Agency conclusion that Ms. Kostic was discharged on October 13, 2015 for excessive unexcused absences. After due notice was issued, a hearing was held on December 8, 2015. Ms. Kostic participated. Shelly Dorman represented the employer and presented additional testimony through Jerry Akers, Samantha Reges, and Jen Spear. Exhibits One through Fifteen and A were received into evidence.

**ISSUE:**

Whether Ms. Kostic 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: Dzenifa Kostic was employed by Sharpness, Inc., d/b/a Great Clips, as a full-time hair stylist from 2012 until October 13, 2015; when Jerry Akers, Owner, and Samantha Reges, General Manager, discharged her for attendance. Ms. Kostic's immediate supervisor was Jennifer Spear, Salon Manager and Area Manager.

The employer has a written attendance policy that the employer provided to Ms. Kostic at the start of her employment. If Ms. Kostic needed to be absent the employer required that she personally telephone her manager at least two hours prior to the scheduled start of the shift. The policy stated that text messages were not allowed. The policy stated that Ms. Kostic was required to call each day she was absent. If Ms. Kostic needed to be absent from all or part of her shift, the employer's policy also required that she make a good faith effort to locate another employee to work as a substitute. The employer provided Ms. Kostic with telephone numbers for other stylists. The employer's policy also required that Ms. Kostic be present and clocked in 15 minutes prior to the start time posted on the work schedule. The employer had this requirement because the employer expected Ms. Kostic to be ready to serve customers at the start time posted on the schedule. The employer compensated Ms. Kostic for this prep time.

The employer considered numerous absences when making the decision to discharge Ms. Kostic. On October 13, 2015, Mr. Akers and Ms. Reges had gone to the employer's Cedar Falls salon for the purpose of discharging Ms. Kostic for attendance. Ms. Kostic was supposed to arrive at 12:45 p.m. but arrived at 1:03 p.m. Ms. Kostic had been pulled over for speeding. Ms. Kostic had been speeding because she had been running late. Ms. Kostic had also been late for personal reasons on October 12. Ms. Kostic had been absent due to illness on October 9 and had properly notified the employer. Ms. Kostic saw the doctor for a back issue on that day and the doctor advised her to remain off work on October 10. Ms. Kostic properly notified the employer of the absence and attempted to find a replacement. On October 7, Ms. Kostic left work early to visit her boyfriend; who was hospitalized for a substance abuse issue. There was no emergency situation that necessitated Ms. Kostic's early departure or that provided a reasonable basis for not waiting until the end of the shift to go visit the boyfriend. On October 1 and 2, Ms. Kostic was absent due to illness and properly reported the absences to the employer. On September 13, Ms. Kostic was absent because her boyfriend's mother had just been admitted to the hospital and Ms. Kostic wanted to interpret for the boyfriend's mother who speaks Bosnian. Ms. Kostic provided sent a text message to the employer at 7:50 a.m. to indicate she would not appear for a meeting at 8:45 a.m. or for her shift at 9:45 a.m. Ms. Kostic did not call the employer. The employer considered many earlier absences or late arrivals. Some of those earlier absences were due to illness. Several of those earlier absences were due to matters of personal responsibility and/or were not properly reported to the employer. Ms. Kostic's absences occurred in the context of repeated and progressive reprimands for attendance that included a brief suspension at the end of August 2015.

#### **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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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.

Though some of Ms. Kostic's absences were for illness and were properly reported to the employer, the evidence in the record establishes a pattern of unexcused absences. On several occasions, Ms. Kostic was late for personal reasons. On several occasions, Ms. Kostic was absent due to illness but did not properly report the absence to the employer.

On several occasions, Ms. Kostic found some other reason to be late, leave early, or be absent from her shift. The pattern indicates that appearing for work, getting to work on time, and staying at work was not a priority for Ms. Kostic. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kostic was discharged for misconduct. Accordingly, Ms. Kostic 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.

**DECISION:**

The November 13, 2015, reference 01, decision is affirmed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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