

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KIM L SHEMWELL**

Claimant

**APPEAL NO. 12A-UI-04943-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**UNLIMITED DEVELOPMENT INC**

Employer

**OC: 03/25/12**

**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the April 20, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 21, 2012. Claimant Kim Shemwell participated. Tara Helenthal represented the employer and presented additional testimony through Peggy Tripp.

**ISSUE:**

Whether the claimant 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: Kim Shemwell was employed by Unlimited Development, Inc., doing business as River Hills Village, a long-term care facility, as a part-time dietary aide from 2010 until March 23, 2012, when Tara Helenthal, assistant administrator, discharged her from the employment. Ms. Shemwell's immediate supervisor was Peggy Tripp, food service supervisor.

The final incident that triggered the discharge was Ms. Shemwell's unauthorized early departure from work on March 23, 2012. Ms. Shemwell was scheduled to work until 2:00 p.m., but left prior to 1:30 p.m. without clocking out. At the time, Ms. Shemwell was on work release from the Lee County Jail. Ms. Shemwell and the employer knew that Ms. Shemwell's work release conditions required that she report directly to the jail upon leaving work at the end of her shift. The employer's established procedure required that Ms. Shemwell check in with Ms. Tripp if she needed to leave work early. On March 23, Ms. Shemwell left early without approval and without clocking out so that she could have more time to engage in personal activities prior to returning to the Lee County Jail. The employer became aware of the early departure at 1:30 p.m. when a coworker reported Ms. Shemwell had left and Ms. Tripp could not locate Ms. Shemwell. A coworker telephoned Ms. Shemwell to tell her that the employer knew she had left and to instruct Ms. Shemwell to call the employer. Ms. Shemwell then called and spoke with Ms. Helenthal. When Ms. Helenthal asked why Ms. Shemwell why she had left early without checking out, Ms. Shemwell had no answer. Ms. Helenthal was concerned that Ms. Shemwell

had involved the employer in a violation of her work release conditions and discharged Ms. Shemwell from the employment.

Ms. Shemwell's failure to clock out on March 23 followed many earlier instances of failing to properly clock in at the start of the shift, when leaving for lunch or returning for lunch, and/or at the end of the shift. Ms. Shemwell merely had to swipe a badge to clock in or out. In 2011, Ms. Shemwell failed to properly clock in and/or out one or more times on the following days: August 15, 18, 22, 24, 25, and 30, September 1, 7, and 8, and November 6, 10, 11, 15, and 16. In 2012, Ms. Shemwell's failure to properly clock in or out was limited to February 8 and March 23.

## **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).

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

The weight of the evidence in the record establishes that Ms. Shemwell absconded from work early on March 23 without clocking out in order to violate the conditions of her work release from the Lee County Jail. By doing so, Ms. Shemwell involved the employer and the employment in her violation of the work release conditions. While the administrative law judge concludes that this incident was sufficient to establish a willful disregard of the employer's interests, Ms. Shemwell's failure to clock out on March 23 was also part of an established pattern of failing to properly clock in or out. That pattern also indicated a disregard of the employer's interests in accurately tracking Ms. Shemwell's work time.

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

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 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 20, 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 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/kjw