

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICKI P KHAMSAI
Claimant

APPEAL NO. 17A-UI-12258-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC
Employer

OC: 10/29/17
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 20, 2017, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on October 31, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on December 18, 2017. Claimant Nicki Khamsai participated. Bruce Barton represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 8 into evidence. The administrative law judge took official notice of the fact-finding materials and labeled on document in that packet as Department Exhibit D-1.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicki Khamsai was employed by Packers Sanitation Services, Inc. (PSSI) during multiple distinct periods. The most recent period of employment began in July 2017 and ended on October 31, 2017, when Bruce Barton, Site Manager, discharged Mr. Khamsai from the employment for attendance. Mr. Khamsai worked as part of an evening cleaning crew assigned to Webster City Custom Meats. Mr. Khamsai's immediate supervisors included Kong Colson. Mr. Colson reports to Mr. Barton. Mr. Khamsai's regular work hours were 6:00 p.m. to 2:00 a.m., Monday through Friday. Mr. Khamsai also worked Saturdays as needed. Mr. Khamsai was assigned to

clean the boning room. The room was 35 feet by 45 feet and contained seven machines. Mr. Khamsai would work alone. To clean the boning room, Mr. Khamsai would need to hose off the machinery, walls and metal tubs, apply a chemical foam agent to those surfaces, and then rinse the foam agent from those surfaces. Even if the boning room had not been used as part of Webster City Custom Meats' daily production, there would be six to 30 metal tubs to clean through the same process. In addition, the room would have to be cleaned and sanitized in anticipation of subsequent production to ensure food safety. It would generally take Mr. Khamsai about six hours to clean the boning room. Mr. Khamsai's speed record for cleaning the boning room, not including the metal tubs, was 4.5 hours. If Mr. Khamsai completed his cleaning duties before the scheduled end of his shift, he was expected to contact a supervisor or lead to see whether he was needed elsewhere.

The employer did not have or enforce a written attendance policy at the Webster City Custom Meats facility. Instead, Mr. Barton had told Mr. Khamsai and others that if they needed to be absent, late or leave early, they needed to contact him at his cell phone number. Mr. Khamsai had Mr. Barton's cell phone number and was aware of the absence reporting policy.

The final absence that triggered the discharge occurred on October 30, 2017. Mr. Khamsai arrived for work on time, clocked in, suited up, went to the boning room, saw that the boning room had not been used in production that day, and then left the workplace without clocking out. Mr. Khamsai did not clean the dirty tubs in the boning room and did not sanitize the room in anticipation of subsequent production. Mr. Colson was on-site at the time Mr. Khamsai arrived and left. Mr. Khamsai did not ask Mr. Colson whether it was okay for him to leave. Instead, Mr. Khamsai *told* Mr. Colson he was leaving and then departed from the workplace. When Mr. Barton arrived at 8:00 p.m., members of the cleaning crew told Mr. Barton about Mr. Khamsai's abrupt departure from the workplace. At 8:25 p.m. on October 31, Mr. Barton sent Mr. Khamsai a text message discharging him from the employment. Mr. Khamsai responded with a text message stated that he was not going to stay to help other employees because they did not help him.

In making the decision to discharge Mr. Khamsai from the employment, Mr. Barton considered prior absences and reprimands. On August 30, 2017, Mr. Khamsai left for his 30-minute lunch break and did not return until two hours later. Mr. Khamsai had not requested, and the employer had not approved, the 1.5 hour absence. On September 6, 2017, Mr. Khamsai was late for work for personal reasons and left work early without permission. Mr. Barton issued a two written reprimands to Mr. Khamsai in connection with the two absences. On September 11, 2017, Mr. Khamsai was late to work for personal reasons. In response to that late arrival, Mr. Barton suspended Mr. Khamsai for three days. On September 15, 2017, Mr. Khamsai told a supervisor that he had completed his cleaning duties in order to get permission to leave early, but had not in fact completed his duties. On October 23, 2017, Mr. Khamsai was late for personal reasons.

Mr. Khamsai established an original claim for unemployment insurance benefits that was effective October 29, 2017. Workforce Development has approved \$1,550.00 in benefits for the five-week period of October 19, 2017 through December 16, 2017. All but \$108.00 of the approved benefits have been applied against a prior overpayment of unemployment insurance benefits. The \$108.00, minus tax withholding, was paid to a debit card for the week that ended December 16, 2017. PSSI is the sole base period employer in connection with the claim.

On November 16, 2017, a Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Khamsai's separation from the employment. The employer had notice of the fact-finding interview and had designated Mr. Barton as the employer's

representative at the fact-finding interview. The deputy attempted to reach Mr. Barton at the time of the fact-finding interview and left a message for Mr. Barton. Mr. Barton did not review the message until the next day. The employer had submitted for the fact-finding interview the several written reprimands the employer issued to Mr. Khamsai during the employment. The written reprimands set forth the particulars of the absences upon which the reprimands were based. At the fact-finding interview, Mr. Khamsai knowingly and intentionally provided false information to the deputy. Mr. Khamsai denied having received any reprimands during the employment, including those reprimands that bore his signature.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

The weight of the evidence in the record establishes a discharge that was based on excessive unexcused absences and intentional dishonesty. The weight of the evidence establishes that Mr. Khamsai left work early on October 30, 2017 without approval and without notifying Mr. Barton pursuant to the established protocol. The absence was unexcused under the applicable law. The evidence in the record establishes additional unexcused absences on August 30, September 6, September 11, September 15 and October 23, 2017. On August 30, Mr. Khamsai elected to take an unauthorized 1.5 break mid-shift. On September 6, September 11 and October 23, he was late for personal reasons. On September 6, he also left work early without permission. On September 15, Mr. Khamsai was intentionally dishonest with the employer to gain permission to leave work early under the false assertion that his work was done. These unexcused absences occurred in the context of multiple and progressive reprimands for attendance.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Khamsai was discharged for misconduct in connection with the employment. Accordingly, Mr. Khamsai is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Khamsai must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Khamsai was previously credited \$1,550.00 in unemployment insurance benefits for the five-week period of October 29, 2017 through December 16, 2017. Because this decision disqualifies Mr. Khamsai for those benefits, the benefits credited to Mr. Khamsai constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews as follows:

Employer and employer representative participation in fact-finding interviews.
24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

The written materials the employer submitted for the fact-finding interview were sufficient to constitute participation in the fact-finding interview. Even if the administrative law judge were to conclude that the employer did not satisfy the participation requirement, the evidence establishes that Mr. Khamsai knowingly and intentionally misled the Benefits Bureau deputy at the time of the fact-finding interview by asserting he had not received the reprimands, including those that bore his signature. Mr. Khamsai is required to repay the paid benefits. The employer's account shall be relieved of liability for benefits on the claim, including liability for benefits already paid to Mr. Khamsai.

DECISION:

The November 20, 2017, reference 01, decision is reversed. The claimant was discharged on October 31, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,550.00 in benefits for the five-week period of October 29, 2017 through December 16, 2017. The claimant must repay the benefits. The employer's account shall be relieved of liability for benefits on the claim, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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