

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DONNA S WOLFE**

Claimant

**APPEAL NO. 10A-UI-06288-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**Original Claim: 03/21/10  
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 14, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 15, 2010. The claimant participated. Sallie Maly, Store Manager, represented the employer. Exhibits One through Four were received into evidence.

**ISSUE:**

Whether Ms. Wolfe 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: Donna Wolfe was employed by Casey's Marketing Company as a part-time pizza maker from April 2009 until March 5, 2010, when Sallie Maly, Store Manager, discharged her for attendance. Ms. Maly was Ms. Wolfe's immediate supervisor.

The employer has a written attendance policy set forth in an employee handbook. The policy required that Ms. Wolfe notify her immediate supervisor prior to the scheduled start of her shift if she needed to be absent. The handbook was not distributed to employees, but instead was made available to employees at the store. At the beginning of her employment, Ms. Wolfe acknowledged in writing that the handbook was available for her review and further acknowledged her obligation to read the handbook.

The final absence that prompted the discharge occurred on March 4, 2010. Ms. Wolfe knew she was scheduled to work 2:00-11:15 p.m. Ms. Wolfe did not appear for the shift. Ms. Wolfe had fallen down her basement stairs at 1:30-1:45 p.m. and had hurt her foot. Ms. Wolfe indicates that she remained in her basement until 5:15 p.m., when she made her way back upstairs. Ms. Wolfe did not immediately seek medical attention and did not immediately contact the employer. At 7:30 p.m. on March 4, Ms. Wolfe telephoned the workplace and told another kitchen employee that she had hurt her foot. Ms. Maly was working at the time, but Ms. Wolfe did not request to speak with Ms. Maly. Ms. Maly had already decided to discharge Ms. Wolfe

from the employment after Ms. Wolfe failed to appear for her shift at the scheduled time. Ms. Wolfe had previously been absent without notifying the employer on February 14 and 15.

Ms. Maly considered additional prior absences in making the decision to discharge Ms. Wolfe from the employment. On August 16 and September 30, 2009, Ms. Wolfe was absent without notifying the employer. After the first absence, Ms. Maly issued a written warning. After the second absence, Ms. Maly issued a verbal warning. On October 11 and 12, and December 20, 2009, Ms. Wolfe was absent due to illness and properly notified the employer. On December 26 and 27, Ms. Wolfe was absent due to weather conditions. Ms. Maly did not consider these two absences. On December 29, Ms. Wolfe was absent without notifying the employer. Another employee went to Ms. Wolfe's house to check on her and Ms. Wolfe indicated at that time that she was sick. Ms. Wolfe was gone from work on January 8, 9, 11, and 15 in connection with her boyfriend's terminal illness and Ms. Maly did not consider these absences. On January 17-29, Ms. Wolfe was on an approved leave of absence after her boyfriend passed away.

### **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).

The weight of the evidence in the record establishes an unexcused absence on March 4, 2010. Ms. Wolfe may very well have hurt her foot in a fall at 1:30-1:45 p.m. However, this does not explain why she would remain in her basement for almost four more hours after such a fall. Nor does the fall or the alleged delay in coming upstairs adequately explain why Ms. Wolfe waited more than two hours after she allegedly came upstairs to telephone the employer or why she did not request to speak to Ms. Maly, who was working at the time. Had Ms. Wolfe hurt her foot as much as she suggests, one would expect her to seek immediate medical attention, but she did not do that. The final absence followed two consecutive no-call, no-show absences on February 14 and 15 and three earlier no-call, no-show absences on August 16, September 30, 2009, and December 29. Each of the no-call, no-show absences was an unexcused absence under the applicable law. Ms. Wolfe's unexcused absences were excessive and constituted misconduct in connection with the employment.

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

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 14, 2010, 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