

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TINA M DEWEY**  
Claimant

**APPEAL NO. 10A-UI-08302-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BRONZING EXPERIENCE LLC/BRONZING  
EXPERIENCE TANNING & DAY SPA**  
Employer

**OC: 11/22/09**  
**Claimant: Respondent (3-R)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 3, 2010, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on September 1, 2010. Claimant Tina Dewey participated. Brenda Miller represented the employer. Exhibits One, Two, Three, and A through F were received into evidence. The administrative law judge took official notice of the Agency's administrative record of benefits disbursed to the claimant and wages reported by or for the claimant.

**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: Tina Dewey was employed by Bronzing Experience Tanning & Day Spa as a part-time hair stylist from January 2010 until April 6, 2010, when Brenda Miller, owner and manager, discharged her for attendance. If Ms. Dewey needed to be absent from work, Ms. Miller expected 24-hour notice. If this was not possible, Ms. Miller expected to be contacted prior to the scheduled start of the employee's shift. Ms. Dewey was aware of these requirements. Ms. Miller had provided employees, including Ms. Dewey, with her cell phone number so that employees could contact her directly if they needed to be absent. Ms. Dewey knew she was required to contact Ms. Miller directly.

The final absence that triggered the discharge occurred on April 6, 2010. Ms. Dewey was scheduled to work at 12:45 p.m. Ms. Dewey was absent due to illness. Ms. Dewey contacted the workplace around 9:00 a.m. and, notified a coworker that she would be absent. Ms. Dewey did not contact Ms. Miller directly.

In making the decision to discharge Ms. Dewey from the employment, Ms. Miller considered prior absences. On January 21, Ms. Dewey left work early with the employer's permission due

to a knee injury sustained as she was entering the building that day. On January 22, Ms. Dewey was absent due to the knee injury and notified the employer prior to her shift. On February 3, Ms. Dewey was absent due to illness, but did not speak directly to Ms. Miller. On February 7, Ms. Dewey was late to work because she was meeting with a tax consultant. On February 8, Ms. Dewey was late because she was cashing a tax refund loan check. On February 18, Ms. Dewey was absent due to illness and notified Ms. Miller before her shift.

In March 2010, Ms. Dewey started working at Domino's Pizza as a delivery driver, while she still worked for Bronzing Experience. Ms. Dewey is guaranteed a wage of \$7.25 per hour at Domino's. Ms. Dewey had made \$8.00 per hour at Bronzing Experience. Between the two employments, Ms. Dewey worked full-time, or near full-time hours. The employment at Domino's was initially part time, 15-20 hours per week. Ms. Dewey began working full time, 35-40 hours per week, at Domino's on April 10, 2010, after her discharge from Bronzing Experience. Ms. Dewey did not work at Domino's during the period of May 26, 2010 to June 1, 2010, due to what she describes as a nervous breakdown. Ms. Dewey was released by a doctor to return to work on June 1, 2010, without restrictions. Ms. Dewey then returned to her full-time employment at Domino's. On August 2, 2010, Ms. Dewey slipped in the course of her work at Domino's and twisted her right knee. Ms. Dewey was then off work due to the injured knee until the week that started August 22, 2010, when she was released to return to work with the restriction that she drive no more than four hours at a time. At the time of the September 1, 2010 hearing, Ms. Dewey indicated that the work restrictions were expected to be lifted effective Thursday, September 2, 2010.

Ms. Dewey searched for new employment as a stylist after her discharge from Bronzing Experience. Ms. Dewey located new employment and accepted an offer of employment, but was not able to commence the new employment due to the knee injury sustained in the course of working for Domino's.

Ms. Dewey established an additional claim for benefits that was effective April 4, 2010 and has received benefits. For the period of April 11, 2010 through the benefit week that ended September 4, 2010, Ms. Dewey received \$5,571.00 in regular benefits and an additional \$525.00 in federal stimulus unemployment insurance benefits.

Ms. Dewey's base period wages are based on a history of full-time employment

#### **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 that the final absence on April 6, 2010 was an unexcused absence under the applicable law because it was not properly reported directly to

Ms. Miller as required by the employer. The weight of the evidence establishes additional unexcused absences on February 3, 7, and 8. The remaining absences were due to illness properly reported to the employer and were excused absences under the applicable law. Because there was an approximate two-month period of good attendance between the final unexcused absence and the next most recent unexcused absence, the administrative law judge concludes that Ms. Dewey's unexcused absences were not excessive, did not constitute misconduct in connection with the employment, and would not disqualify her for unemployment insurance benefits. The employer's account may be charged for benefits paid to Ms. Dewey.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a and (2) provide:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Administrative Code section 871 IAC 24.23 provides in relevant part as follows:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

24.23(1) An individual who is ill and presently not able to perform work due to illness.

24.23(6) If an individual has a medical report on file submitted by a physician, stating such individual is not presently able to work.

24.23(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

24.23(29) Failure to work the major portion of the scheduled workweek for the claimant's regular employer.

24.23(34) Where the claimant is not able to work due to personal injury.

24.23(35) Where the claimant is not able to work and is under the care of a medical practitioner and has not been released as being able to work.

Because Ms. Dewey's unemployment insurance claim is based on a history of full-time employment, Ms. Dewey is required to be available for and to seek full-time employment to be eligible for benefits. But there is no provision of the Iowa Code or the Iowa Administrative Code that authorizes benefits when a person is actually working full-time, but not making a wage in the current employment that matches their wage in a previous employment. In fact, a person who is working full time is not eligible for unemployment insurance benefits under Iowa Administrative Code section 871 IAC 24.23(23).

The weight of the evidence in the record establishes that Ms. Dewey was employed full time at Domino's Pizza effective April 10, 2010. Ms. Dewey would be eligible for benefits for the week ending April 10, 2010, because for all but the last day of that week she was employed only part time with Domino's after being discharged from Bronzing Experience. Thus, effective the benefit week that started April 11, 2010, due to the full-time employment at Domino's, Ms. Dewey would not meet the work availability requirements of the law and would not be eligible for benefits.

The weight of the evidence indicates since Ms. Dewey filed her claim and started working full time for Domino's, the employment at Domino's has dipped to something less than full time only when Ms. Dewey had a mental health issue or a physical health issue that prevented her from working full-time hours. Ms. Dewey would not be eligible for benefits for the week that ended May 29, 2010 because of the mental health issues that prevented her from working the majority of that week. Ms. Dewey would not be eligible for benefits for the weeks ending August 14 and 21, 2010, because she was off work due to her injury. Ms. Dewey would not be eligible for benefits for the weeks ending August 28 and September 4, 2010, because she was limited for health reasons to working only part-time hours at the full-time Domino's employment and because she was not available for other employment, as indicated by her inability to start a new stylist job due to her injury. Ms. Dewey's ineligibility for benefits continued as of the time of the hearing.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The weight of the evidence indicates that for the period of April 11, 2010 through the benefit week that ended September 4, 2010, Ms. Dewey received \$5,571.00 in regular benefits and an additional \$525.00 in federal stimulus unemployment insurance benefits. Because Ms. Dewey was ineligible for benefits for this period, these benefits constitute an overpayment that Ms. Dewey must repay to Workforce Development.

Because Ms. Dewey had not yet been released to return to work without restrictions as of the September 1, 2010, this matter will be remanded to the Claims Division to address the issues of Ms. Dewey's work ability and work availability effective September 5, 2010, along with any overpayment of benefits for the period beginning September 5, 2010.

**DECISION:**

The Agency representative's June 3, 2010, reference 02, decision is modified as follows. The claimant was discharged for no disqualifying reason. The claimant would be eligible for benefits, provided she met all other eligibility requirements. The employer's account may be charged for benefits.

The claimant is eligible for benefits for the week ending April 10, 2010, during which she was discharge from Bronzing Experience and working only part time at Dominos' Pizza.

Effective April 11, 2010, the claimant is disqualified for benefits because she does not meet the work availability requirements of the law. This disqualification continued as of the September 1, 2010 appeal hearing. Thus, the claimant was disqualified for benefits for the period of April 11, 2010 through September 4, 2010.

The claimant is overpaid \$5,571.00 in regular benefits and an additional \$525.00 in federal stimulus unemployment insurance benefits for the period of April 11, 2010 through September 4, 2010.

This matter is remanded to the Claims Division to address the claimant's work ability and work availability effective September 5, 2010, along with any overpayment of benefits for the period beginning September 5, 2010.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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