

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SASHA L ALLISON**  
Claimant

**APPEAL NO. 15A-UI-06120-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**APPLE CORP L P**  
Employer

**OC: 05/03/15**  
**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 May 21, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant had been discharged on May 6 2015 for no disqualifying reason. After due notice was issued, a hearing was held on July 8, 2015. Claimant Sasha Allison participated and presented additional testimony through Jessica Bekkum. Shawna Hayes, General Manager, represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Six and Eight into evidence.

**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 is required to 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: Sasha Allison was employed by Apple Corps, L.P., doing business as Applebee's, as a part-time server from April 2014 until May 6, 2015, when Stephanie Balmer, Assistant Manager, discharged her for attendance. The final absence that triggered the discharge occurred on May 5, 2015, when Ms. Allison was absent from her 10:00 a.m. shift due to a lack of child care. Ms. Allison notified the employer of the absence at 9:35 a.m. The employer has a written attendance policy set forth in the employee handbook that the employer provided to Ms. Allison at the start of her employment. The policy required that Ms. Allison notify the employer at least two hours prior to the scheduled start of her shift if she needed to be absent. The policy also

required that Ms. Allison find a coworker to cover the missed shift unless the absence was due to illness and was supported by a doctor's note. The policy also indicated that absences due to illness that were not supported by a doctor's note would be deemed unexcused.

In making the decision to discharge Ms. Allison from the employment, the employer considered several prior absences and reprimands for attendance.

On January 3, 2015, Ms. Allison was absent from a mandatory meeting set for 9:00 a.m. due to a lack of child care. Ms. Allison had been notified of the meeting a few weeks earlier. Also on January 3, 2015, Ms. Allison was absent from her 10:30 a.m. shift due to a lack of child care. Ms. Allison notified the employer of the absence at 10:15 a.m. Shawna Hayes, General Manager, issued a written reprimand to Ms. Allison in connection with the absences. Ms. Hayes warned in the written reprimand that further absences would leave to suspension and other discipline.

On March 9, 2015, Ms. Allison notified the employer three minutes before the scheduled start of her shift that she needed to be absent due to illness. Ms. Hayes issued a written reprimand to Ms. Allison in connection with the absence. In the reprimand, Ms. Hayes reminded Ms. Allison of the attendance policy, including the requirement that Ms. Allison notify the employer at least two hours prior to the scheduled start of her shift if she needed to be absent. Ms. Hayes warned in the reprimand that further unexcused absences would result in a week's suspension and further discipline.

On April 11, 2015, Ms. Allison notified the employer at 9:15 a.m. that she would be absent from her 10:00 a.m. shift because she was locked out of her home. Ms. Allison advised that her house keeper had broken off in the lock. Ms. Allison did not arrange for a coworker to cover the shift. In connection with the absence, the employer issued a written reprimand that included a suspension through April 16, 2015.

Ms. Allison established a claim for benefits that was deemed effective May 3, 2015. Ms. Allison received \$1,578.00 in benefits for the period of May 3, 2015 through July 4, 2015.

On May 19, 2015, a Workforce Development claims deputy held a fact-finding interview to address Ms. Allison's separation from the employment. Ms. Hayes participated in the fact-finding interview on behalf of the employer.

#### **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.

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 evidence in the record establishes excessive unexcused absences. Each of the absences referenced above was an unexcused absence under the applicable law. The January 3 absence from the meeting and scheduled shift were due to a lack of child care, a matter of personal responsibility and was therefore unexcused. The March 9 absence was due to purported illness, but was reported to the employer only three minutes before the start of the shift, not at least two hours prior to the shift. The absence was therefore unexcused. The April 11 absence was due to another matter of personal responsibility relating to Ms. Allison's key situation and was unexcused. The May 5 absence was due to a lack of childcare, a matter of personal responsibility and was therefore unexcused. All of the absences occurred in the context of repeated reprimands that included a period of suspension.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Allison was discharged for misconduct. Accordingly, Ms. Allison 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 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 section 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$1,578.00 in benefits for the period of May 3, 2015 through July 4, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

**DECISION:**

The May 21, 2015, reference 01, decision is reversed. The claimant was discharged on May 6, 2015 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid \$1,578.00 in benefits for the period of May 3, 2015 through July 4, 2015. The claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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