

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**TOMICA D NEAL**  
Claimant

**APPEAL NO. 17A-UI-13204-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**  
Employer

**OC: 11/12/17**  
**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 December 12, 2017, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on November 9, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on January 8, 2018. Claimant Tomica Neal did not comply with the hearing notice instructions to register a telephone number for the appeal hearing and did not participate. Rita Atwood represented the employer and presented additional testimony through Alisha Weber. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 13 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

**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: Tomica Neal was employed by Casey's Marketing Company as a full-time convenience store clerk from 2012 until November 9, 2017, when Rita Atwood, Store Manager, discharged her from the employment for attendance and poor attitude. Ms. Atwood was Ms. Neal's immediate supervisor. Ms. Neal's usual work hours were 7:00 a.m. to 3:00 p.m., Monday through Thursday, and 7:00 a.m. to 2:00 p.m. on Friday. Ms. Neal last performed work for the employer on November 3, 2017 and completed her shift that day. Ms. Neal was next scheduled to work on November 6, 2017. On that day, Ms. Neal was late for personal reasons and did not notify Ms. Atwood that she would be late. When Ms. Atwood attempted to address the matter with Ms. Neal that morning, Ms. Neal stated, "Don't do me—don't talk to me."

The employer's written attendance policy states that, "Employees are required to call the immediate Manager/Supervisor as far in advance as possible when absent from scheduled working hours." Ms. Neal acknowledged her obligation to read and follow the handbook at the time she was hired. The employer maintained a copy of the handbook at the workplace and made the handbook available to employees. If Ms. Neal needed to be absent from work, Ms. Atwood expected Ms. Neal to give at least two hours' notice. Ms. Atwood communicated this expectation to Ms. Neal.

After November 6, 2017, Ms. Neal was next scheduled to work on November 7, 2017. Ms. Neal was absent that day without notice to the employer.

Ms. Neal was next scheduled to work on November 8, 2017. At 6:30 a.m., Ms. Neal called Ms. Atwood and asked whether she could return to the employment. Ms. Atwood told Ms. Neal that she could not stop her from reporting for work, but that her attitude needed to change. At 6:48 a.m., Ms. Neal called again and asserted she had a flat tire. Ms. Neal then did not report for work for any part of the shift or give notice that she would be absent from the entire shift.

Ms. Neal was next scheduled to work on November 9, 2017, but was absent without notifying the employer. On that day, Ms. Atwood documented that she was discharging Ms. Neal from the employment. Ms. Atwood referenced the attendance matters on November 6 through 9 and the attitude concern from November 6. See Exhibit 6.

Ms. Neal established an original claim for benefits that was effective November 12, 2017. Ms. Neal received \$1,710.00 in benefits for the six-week period of November 12, 2017 through December 30, 2017. Casey's Marketing Company is the sole base period employer.

On December 8, 2017, a Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Ms. Neal's separation from the employment. Alisha Weber, an Unemployment Insurance Consultant with Equifax/Talx, represented the employer at the fact-finding interview. Ms. Weber submitted several exhibits for the fact-finding interview. Those exhibits included written reprimands, employer policies, and a hearsay narrative of the events that factored in the separation.

## **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 evidence in the record establishes a November 9, 2017 discharge that was based on excessive unexcused absences. Ms. Atwood documented on November 9 that she had discharged Ms. Neal on that date. See Exhibit 6. Each of the four absences during the period of November 6-9 was an unexcused absence under the applicable law. On November 6, Ms. Neal was late for personal reasons without notice to the employer. On November 7 and 9, Ms. Neal was a no-call/no-show. On November 8, Ms. Neal called to ask whether she could return to work, was told she could, called back several minutes later to assert she had a flat tire, then failed to appear for the remainder of the shift and failed to give notice that she would not be appearing for any portion of the shift.

Because the evidence establishes a discharge for misconduct in connection with the employment, Ms. Neal is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Neal 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 for 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).

Ms. Neal received \$1,710.00 in benefits for the six-week period of November 12, 2017 through December 30, 2017. This decision disqualifies Ms. Neal for those benefits. Accordingly, the benefits Ms. Neal received constitute an overpayment of benefits. The employer participated in the fact-finding interview within the meaning of the law through the combination of Ms. Weber's presence and submission of relevant and material documents. Accordingly, Ms. Neal is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Ms. Neal.

**DECISION:**

The December 12, 2017, reference 01, decision is reversed. The claimant was discharged on November 9, 2017 for misconduct in connection with the employment. 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. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,710.00 in benefits for the six-week period of November 12, 2017 through December 30, 2017. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs