

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DANIELLE TAYLOR
Claimant

APPEAL NO. 18A-UI-08753-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KINSETH HOTEL CORPORATION
Employer

OC: 07/22/18
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 August 8, 2018, 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 July 20, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 25, 2018. Claimant Danielle Taylor participated. Christopher Hunter of Employers Unity represented the employer and presented testimony through Coral Erickson, Tasia Jones, Elliott Rhoad, and Matthew Robinson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 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: Danielle Taylor was employed by Kinseth Hotel Corporation, d/b/a Holiday Inn in Dubuque as a full-time laundry attendant until July 20, 2018, when Elliott Rhoad, General Manager, discharged her from the employment. Tasia Jones, Executive Housekeeper, was Ms. Taylor's immediate supervisor.

The incident that triggered the discharge occurred on July 20, 2018. Ms. Taylor was scheduled to work at 8:00 a.m. Ms. Taylor called the workplace shortly before 8:00 a.m. and left a voice mail message for Ms. Jones stating that she would be late. Between 9:15 and 9:30 that morning, Ms. Jones and another employee stepped outside the back of the hotel to have a cigarette and heard loud yelling and music nearby. Ms. Taylor and some friends were parked on the street behind the parking ramp that was adjacent to the hotel having an alcohol-fueled party in Ms. Taylor's friend's car. Ms. Taylor had been at that location with her friends for upwards of an hour and a half, meaning that Ms. Taylor had been outside the backdoor of the workplace since the scheduled start of her shift. Ms. Jones observed as beer cans and alcohol bottles were tossed out the windows of the car. Ms. Jones observed Ms. Taylor in the back seat holding a bottle in a brown paper bag and twisting the bottle cap. Ms. Taylor concedes she had been drinking from the bottle in a brown paper bag, but asserts the bottle in the brown paper bag was a soft drink. Ms. Taylor concedes that the other three people in the car were consuming beer and consuming hard liquor from small "shooter" bottles. Ms. Jones re-entered the hotel and alerted Mr. Rhoad. Mr. Rhoad accompanied Ms. Jones outside the back of the hotel. Mr. Rhoad observed Ms. Taylor holding an open bottle of beer and exchanging bottles of alcohol with others in the car. Mr. Rhoad observed as Ms. Taylor opened a car door and placed an alcohol bottle on the ground between the tire of the car and curb. Matthew Robinson, Regional Food and Beverage Supervisor, was also present and observed Ms. Taylor drinking from the bottle in the brown paper bag.

While Ms. Jones and Mr. Rhoad were outside watching Ms. Taylor and her friends partying in the car, the police arrived. When the police arrived, Ms. Taylor quickly exited the car and told the police that she needed to get to work at the Holiday Inn. The police were focused on the driver of the car. The police allowed Ms. Taylor to leave the vicinity of the car and enter the workplace. Ms. Taylor clocked in at 9:55 a.m. Mr. Rhoad met with Ms. Taylor at that time. Mr. Rhoad told Ms. Taylor that he had observed her consuming alcohol in the car and asserted that Ms. Taylor had reported for work under the influence of alcohol. Ms. Taylor replied, "I don't care. So what?" Mr. Rhoad told Ms. Taylor that he was ending her employment. Mr. Rhoad deemed Ms. Taylor to have violated the employer's written Substance Abuse Policy, which states as follows:

It is the policy of KHC that while on Property; employees shall not possess, use, distribute or be under the influence of alcohol or illegal drugs. ... Any violation of this policy may result in disciplinary action up to and including discharge.

The policy was included in the employee handbook the employer provided to Ms. Taylor at the start of her employment in January 2018. The employer's policy did not include a provision for alcohol testing. As Ms. Taylor stormed out on July 20, she said, "Fuck you. You are all fucking bitches." Ms. Taylor rejoined her friends and the police in the vicinity of the car. The police allowed Ms. Taylor to receive the keys to the car so that she could drive the car home.

Ms. Taylor established an original claim for benefits that was effective July 22, 2018 and received \$1,239.00 in benefits for the seven weeks between August 5, 2018 and September 22, 2018. Kinseth Hotel Corporation is a base period employer in connection with the claim.

On August 7, 2018, an Iowa Workforce Development deputy held a fact-finding interview that addressed Ms. Taylor's separation from the employment. Coral Erickson, a Claims Specialist with Employers Unity appeared at the fact-finding interview on behalf of the employer, provided a verbal statement setting forth the basis for the discharge, and submitted documentation, including written statements from Ms. Jones, Mr. Rhoad, and Mr. Robinson.

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).

While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See *Sallis v. Employment Appeal Board*, 437 N.W.2d 895 (Iowa 1989). In *Sallis*, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The evidence in the record establishes misconduct in connection with the employment, based on the July 20, 2018 incident. The weight of the evidence establishes that Ms. Taylor was indeed consuming alcohol with her friends on that morning. Ms. Taylor's assertion that she was drinking soda from a brown paper bag is highly implausible and not credible. All of the surrounding circumstances would lead a reasonable person to conclude the brown paper bag contained an alcoholic drink. The employer reasonably concluded under the circumstances that Ms. Taylor was under the influence of alcohol within the meaning of Iowa Code Section 730.5(9)(e), which defines under the influence in the context of the private sector workplace as .02 grams of alcohol per 210 liters of breath or its equivalent. The employer did not have an alcohol testing provision and the law did not require the employer to have such a provision. The fact that the police did not deem Ms. Taylor to meet the higher standard of being under the influence found in the Iowa Criminal Code does not undermine the employer's assertion of misconduct in connection with the employment. The fact that Ms. Taylor was drinking adjacent to, but not on, the employer's property does not undermine the employer's assertion of misconduct in connection with the employment. Ms. Taylor elected to skip upwards of two hours of her work day so that she could foolishly participate in a booze party outside the employer's back door. Ms. Taylor's conduct that day demonstrated a willful and wanton disregard of the employer's interests.

Because the evidence in the record establishes a discharge based on misconduct in connection with the employment, Ms. Taylor 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. Taylor 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).

Ms. Taylor received benefits, but this decision disqualifies her for those benefits. Accordingly, Ms. Taylor is overpaid \$1,239.00 in benefits for the seven weeks between August 5, 2018 and September 22, 2018. The employer participated in the fact-finding interview within the meaning of the law based on Ms. Erickson's presence and the accompanying documentation. Accordingly, Ms. Taylor must repay the overpaid benefits. The employer's account shall be relieved of charges, including charges for benefits already paid.

DECISION:

The August 8, 2018, reference 01, decision is reversed. The claimant was discharged on July 20, 2018 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 amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,239.00 in benefits for the seven weeks between August 5, 2018 and September 22, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of charges, including charges for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs