

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ALEJANDRO NUNEZ**  
Claimant

**APPEAL NO. 15A-UI-04965-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HY-VEE INC**  
Employer

**OC: 04/05/15**  
**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 April 20, 2015, reference 01, decision that allowed benefits to the claimant provided he 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 March 23, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on June 4, 2015. Claimant Alejandro Nunez participated. Evangeline Gaudet of Corporate Cost Control represented the employer and presented testimony through Jamie Aulwes and Wes Mundt. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Ten into evidence. The record was left open for limited purpose of allowing the claimant to resubmit exhibit materials on June 4, 2015 and to allow the employer to provide a response to those materials by June 5, 2015. The claimant submitted materials on June 4, which were received into evidence as Exhibit A. The administrative law judge promptly provided those materials to the employer's representative. The employer submitted a timely response, which was received into the record as Exhibit 11.

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 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: Alejandro Nunez was employed by Hy-Vee as a full-time order filler at the employer's distribution center from November 2014 until March 25, 2015, when Wes Mundt, Perishables Manager, discharged him for attendance. Mr. Nunez's usual work hours were 6:00 p.m. to 2:00 a.m. The employer has a written attendance policy contained in the employee handbook the employer provided to Mr. Nunez at the start of his employment. That policy required that Mr. Nunez personally contact his supervisor at least one hour prior to the scheduled start of his shift if he needed to be absent. The employer has a no-fault attendance policy and attendance point system. The employer issues warnings to employees as they reach particular attendance point thresholds. Mr. Nunez was aware of the attendance policy and the point system.

On December 15, 2014, Mr. Nunez sought medical evaluation and treatment for anxiety and depression. Mr. Nunez attributes his mental health issues to credit card debt. The doctor who evaluated Mr. Nunez on December 15, 2014 concluded Mr. Nunez had minimal to moderate anxiety and minimal to moderate depression. The doctor prescribed an anti-depressant, Citalopram Hydrobromide. Mr. Nunez continued to take that medication until February 2015.

On December 15, 2014, the doctor provided Mr. Nunez with a medical excuse to cover absence on December 12, 13 and 14, but released Mr. Nunez to return to work on December 15, 2014, the same day he was evaluated. The employer had issued several warnings to the claimant for attendance. The employer had issued a verbal warning on December 17, 2014. The employer had issued written warnings on January 6 and January 12, 2015. The January 6 reprimand included a brief disciplinary suspension.

The final absence that triggered the discharge occurred on March 21, 2015, when Mr. Nunez was absent from work because he wanted to spend time with relatives who were visiting from out of town.

The employer considered several prior absences when making the decision to discharge Mr. Nunez from the employment. On November 17, Mr. Nunez hit a deer on his way to work. Mr. Nunez lived about an hour from the workplace. Mr. Nunez notified the employer at 5:15 p.m. that he would be absent from his shift. Mr. Nunez's car had a broken headlight light and damaged bumper, but was operable. Mr. Nunez drove his vehicle home. Mr. Nunez had another vehicle at home that he could use to get to work, but elected not to report for work. On November 29 and December 12, Mr. Nunez was absent due to his mental health issues, but provided less than an hour's notice that he would be absent. On December 13, January 9, 10 and 23, Mr. Nunez was absent due to his mental health issues and provided proper notice to the employer. However, the January absences followed Mr. Nunez medical evaluation in December and his doctor's conclusion at that time that he could immediately return to work. In February, Mr. Nunez had contact with a mental health professional through the employer's Employee Assistance Program. That person concluded one of the things Mr. Nunez could do to improve his mental health was to go to work.

Mr. Nunez established a claim for benefits that was effective April 5, 2015. Mr. Nunez received \$5,181.00 in benefits for the period of April 5, 2015 through June 20, 2015.

On April 17, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Nunez's separation from the employment. Jamie Aulwes, Director of Human Resources, represented the employer at the fact-finding interview and provided a statement to the claims deputy.

## 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 weight of the evidence establishes excessive unexcused absences. The evidence in the record establishes an unexcused absence on March 21, 2015, when Mr. Nunez elected to miss work so that he could spend time with visiting relatives. The evidence establishes additional unexcused absences on November 29 and December 12. On both days, Mr. Nunez was absent due to his mental health issues, but provided less than an hour's notice to the employer. The evidence establishes an unexcused absence on November 17, when Mr. Nunez missed an entire shift because he hit a deer a short distance into his commute. It was reasonable for Mr. Nunez to be late to work that day in light of the collision. Mr. Nunez provided appropriate notice to the employer regarding his need to be late. However, Mr. Nunez then elected to miss the entire shift, though he had another vehicle at home that he could use to commute to work that day. Mr. Nunez's absence, as it relates to missing the entire shift, was unreasonable and constituted an unexcused absence. The weight of the evidence establishes additional unexcused absences on January 9, 10 and 23. Though the absences were due to mental health issues and were properly reported to the employer, they occurred after Mr. Nunez was evaluated by a medical doctor who concluded that he could return to work despite his mental health issues. They also occurred after Mr. Nunez gained the additional benefit of psychotropic medication. The weight of the evidence, including the medical documentation that Mr. Nunez provided for the hearing, fails to establish that it was necessary for Mr. Nunez to miss work after December 15, 2014 due to his mental health issues. The conclusion that Mr. Nunez's mental health issues did not prevent him from reporting for work is further supported by the mental health professional Mr. Nunez had contact with in February, who advised Mr. Nunez that reporting for work would actually be beneficial to his mental health.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nunez was discharged for misconduct. Accordingly, Mr. Nunez is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he 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 \$5,181.00 in benefits for the period of April 5, 2015 through June 20, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

**DECISION:**

The April 20, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$5,181.00 in benefits for the period of April 5, 2015 through June 20, 2015. The claimant is required to repay the overpayment. The employer's account shall 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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