

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANNON R ADAMS
Claimant

APPEAL NO. 16A-UI-08846-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLAZIN WINGS INC
Employer

OC: 06/26/16
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 3, 2016, 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 June 21, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on August 31, 2016. Claimant Shannon Adams did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Jackie Boudreaux of ADP represented the employer and presented testimony through Britany Main and Nathan Varner. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Seven into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of ruling on whether the employer participated in 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: Shannon Adams was employed by Blazin Wings, Inc. as a full-time hospitality team member (host and cashier) from 2014 until June 20, 2016, when Julie Andrews, Regional Manager, discharged her for attendance. Ms. Adams' immediate supervisor was Cynthia Rider, Front of House Manager. In March 2016, Britany Main became the Operations General Manager. Nathan Varner was Heart of House/Kitchen Manager. If Ms. Adams needed to be absent or late, the employer's

policy required that she notify the manager on duty at least two hours prior to her shift. The policy acknowledged that two hours' notice might not be possible for employees assigned to work the morning shift. The policy required that such employees call "as early as possible." The policy also required that employees personally report their absences and prohibited employees from relying on other people to report their absences. The policy was contained in the employee handbook. Ms. Adams received a copy of the handbook and was aware of the absence reporting policy. The opening manager on duty would arrive at 9:00 a.m. The employer's restaurant would open at 11:00 a.m.

The final absence that triggered the discharge occurred on June 20, 2016. Ms. Adams was initially not on the schedule to work that day. Between 9:30 a.m. and 10:30 a.m. that day, Mr. Varner telephoned Ms. Adams and asked her to cover a shift for an absent employee. The shift would start at 11:00 a.m. and was scheduled to last until 4:00 p.m. Ms. Adams told Mr. Varner that it was her birthday and asked whether she could leave at 2:00 p.m. if she agreed to come in. Mr. Varner told Ms. Adams that they would work on that issue. Ms. Adams agreed to work the shift. When Ms. Adams arrived at 11:00 a.m. to cover the shift, she parked her car in front of the restaurant. She also carried an outside beverage container into the restaurant. The employer prohibits outside beverage containers in the employer's restaurant. The employer requests that employees park toward the rear of the restaurant and leave the parking spots in front of the restaurant for paying guests. Ms. Andrews, the Regional Director, was present and asked Ms. Adams to throw away her outside drink and to move her car from the front of the building. After Ms. Andrews spoke to Ms. Adams, Ms. Adams left the building, ostensibly for the purpose of moving her car. Ms. Adams had not said anything before she left the building to indicate that she intended to quit the employment. Ms. Adams got in her car and then drove away. Ms. Adams did not return to work any part of the shift. On the afternoon of June 20, 2016, Ms. Andrews telephoned Ms. Adams' number and left a message indicating that the employment was done. Ms. Main prepared a written reprimand concerning the incident.

In making the decision to discharge Ms. Adams from the employment, the employer considered absences dating back to February 25, 2016 and reprimands the employer had issued in connection with those absences. On February 25, 2016, Ms. Adams was scheduled to work from 9:30 a.m. to 4:30 p.m. On that day, Ms. Adams' mother called the workplace at about 8:30 a.m. to give notice that Ms. Adams would be late. Ms. Adams then did not appear for any part of the shift and made no contact with the employer regarding her need to be absent from the shift. Ms. Main issued a reprimand to Ms. Adams that included a reminder of the two-hour notice requirement. On March 13, Ms. Adams was scheduled to work a double shift. The first shift was to start at 9:30 a.m. Ms. Adams gave proper notice that she needed to miss that shift to participate in a family wake. The second shift was to start at 4:00 p.m. At 4:00 p.m. an unidentified man called the workplace and told the manager on duty that the wake was taking longer than expected and that Ms. Adams might be late for or absent from the shift. At 7:00 p.m. Ms. Adams telephoned the workplace and spoke with Ms. Main. Ms. Adams asked whether she still needed to come in. Ms. Main told Ms. Adams yes, that she needed to come in and work her closing shift. Ms. Adams told Ms. Main that she would have to call back after she checked to see whether someone could watch her children while she worked the shift. It is unclear whether Ms. Adams reported to work for the remainder of the shift. Ms. Main issued a written reprimand to Ms. Adams in connection with the incident. On March 26, 2016, Ms. Adams was scheduled to work at 9:30 a.m., but was absent from the shift. Ms. Adams had an unidentified man notify the employer that she would be absent from the shift. The manager on duty told the caller that Ms. Adams needed to call back and speak with the manager on duty. Ms. Adams did not call back. Supervisor Terry Dyer issued a reprimand to Ms. Adams for the incident.

Ms. Adams established a claim for benefits that was effective June 26, 2016. Ms. Adams received \$1,880.00 in benefits for the eight-week period of June 26, 2016 through August 20, 2016. Blazin Wings, Inc. is the sole base period employer.

On July 29, 2016, a Workforce Development claims deputy held a fact-finding interview to address Ms. Adams' separation from the employment. Ms. Main represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 a discharge for misconduct in connection with the employment based on excessive unexcused absences. Even though Ms. Adams had not been initially scheduled to work on June 19, 2016, she agreed to cover the shift. Based on that agreement, the employer reasonably expected Ms. Adams to work the shift. Ms. Adams reported to the workplace and violated a couple of established work rules in the process. Ms. Adams then elected to leave the premises without authorization when asked to relocate her car. The absence was an unexcused absence. On February 25, 2016, Ms. Adams was absent for personal reasons without giving proper notice under the employer's reasonable absence reporting policy. On March 13, 2016, Ms. Adams was, at minimum, late for her 4:00 p.m. shift for personal reasons without providing proper notice to the employer through personal contact. On March 26, 2016, Ms. Adams was absent for personal reasons without providing proper notice through personal contact. These unexcused absences were not only excessive but also occurred in the context of repeated reprimands for attendance.

Because the evidence establishes that Ms. Adams was discharged for misconduct in connection with the employment, Ms. Adams 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. Adams 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, -b.

Ms. Adams received \$1,880.00 in benefits for the eight-week period of June 26, 2016 through August 20, 2016, but had been disqualified for those benefits. Accordingly, the benefits constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. Adams is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The August 3, 2016, reference 01, decision is reversed. The claimant was discharged on June 19, 2016 for misconduct in connection with employment based on excessive unexcused absences. 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 was overpaid \$1,880.00 in benefits for the eight-week period of June 26, 2016 through August 20, 2016. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs