

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

SONYA L FISHER
Claimant

APPEAL NO. 23A-UI-08000-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE MAIN EVENT INC
Employer

OC: 07/16/23
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) & (d) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

On August 17, 2023, the employer filed a timely appeal from the August 7, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant was otherwise eligible, and that held the employer's account could be charged for benefits, based on the deputy's conclusion the claimant was discharged on July 10, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on September 5, 2023. Sonya Fisher (claimant) participated. Bonnie Brinkley represented the employer. Exhibit 1, the online appeal, was admitted into evidence. Thirty-six minutes before the scheduled start of the hearing, the employer submitted proposed exhibits labeled A, B and C and did not provide these exhibits to the claimant. Proposed Exhibits A, B and C were not admitted into evidence. The administrative law judge took official notice of the following agency administrative records: DBRO, KFFV, and WAGEA. 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.

ISSUES:

Whether the claimant was laid off, was discharged for misconduct in connection with the employment, or voluntary quit without good cause attributable to the employer.
Whether the claimant was overpaid benefits.
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Bonnie Brinkley owns and operations The Main Event, a bar and restaurant located in Bettendorf.

Sonya Fisher (claimant) began her employment with The Main Event in March 2023 and worked as a part-time bartender and server. Ms. Brinkley was the claimant's supervisor. The claimant last performed work for The Main Event on July 2, 2023.

At the time the claimant began her employment at The Main Event, she was already employed as a part-time bartender and server at Rosy's Watering Hole, a bar and restaurant located in Moline, Illinois.

On May 14, 2023, Ms. Fisher notified Ms. Brinkley in writing that she had be hired "full-time" at Rosy's Watering Hole. Ms. Fisher told Ms. Brinkley that her new work schedule at Rosy's was Tuesday, Thursday and Friday, noon to 6:30 p.m., and Wednesday, noon to 8:30 p.m. The Rosy's work schedule amounted to 28 hours a week. The claimant told Ms. Brinkley in writing that in light of her increased work hours at Rosy's, she would thereafter like to limit her availability at The Main Event to Saturdays and Sundays. From that point onward, the parties mutually understood the claimant's work schedule at The Main Event was 5:00 p.m. to "phase" (approximately 9:00 to 10:00 p.m.) on Saturdays and 10:30 a.m. to 3:00 p.m. on Sundays. The employer did not post a work schedule and the claimant did not need a posted work schedule to know her set work hours. In the same May 14, 2023 correspondence, the claimant told the employer she had added another part-time, on-call server job on Sunday evenings at Valley Inn. The claimant worked just one day at Valley Inn, May 21, 2023.

After the claimant committed to being available to work the Saturday and Sunday shift at The Main Event, she was frequently absent from one or both weekend shifts. The Main Event does not have an established absence reporting practice. The claimant generally notified Ms. Brinkley of her need to be absent and also attempted to find coverage for shifts via a Facebook group messaging forum.

On Saturday, June 3, the claimant was absent for personal reasons and notified the employer between 3:00 and 4:00 p.m. that she would be absent from her 5:00 p.m. shift. The claimant enlisted a coworker to cover the shift.

On Sunday, June 4, the claimant was again absent for personal reasons and notified the employer prior to the start of the shift that she would be absent from the 10:30 a.m. to 3:00 p.m. shift. Though no coworker responded to the claimant's Facebook message request to cover that shift, a coworker ended up covering the shift.

On Saturday, June 10, the claimant was absent from her 5:00 p.m. to phase shift due to her son's illness and notified the employer prior to the start of the shift. The claimant's son is 21 years old, attends The University of Iowa, but was living with the claimant during the summer. The claimant's son was suffering from kidney stones. The claimant returned to work on July 11, 2023.

On June 17 and 18, Saturday and Sunday, the claimant was again absent due to her son's illness. The claimant notified the employer prior to the Saturday shift that she would be absent from both weekend shifts. The claimant returned to work weekend shifts on July 24 and 25.

On July 8, the claimant was absent from the Main Event employment because she had decided to add a shift at Rosy's that conflicted with her Main Event work hours. The claimant notified Ms. Brinkley prior to the start of the shift.

The claimant was next scheduled to work on Sunday, July 9, 10:00 a.m. to 3:30 p.m. However, Ms. Brinkley has lost patience with Ms. Fisher's frequent absences and decided not to have her work again until the two could discuss the attendance issue. On the morning of July 9, Ms. Brinkley notified the claimant via text message that the employer had covered the Sunday shift and that the pair needed to meet before the employer would return the claimant to the schedule. At the time the claimant reviewed the employer's message the claimant was already on her way to work.

On July 10, the employer told the claimant that things were not working out due to the claimant's attendance issues and that the employer was placing the claimant in an "on-call" status until after the claimant's August 10 2023 wedding date. There was no guarantee the employer would be returning the claimant to the work schedule at that point. The employer did not ask the claimant for her key to the workplace at the time the employer placed the claimant off work indefinitely.

When the employer did not make hours available to the claimant during the weekend of July 15 and 16, the claimant established an unemployment insurance an unemployment insurance claim that Iowa Workforce Development deemed effective July 16, 2023.

On Friday, July 21, the claimant went to the workplace to collect her most recent paycheck. While she was there she handed her work key to the employer. The expressed an interest in discussing the claimant's employment status, but the claimant declined to further discuss the matter at that time.

In connection with the original claim for benefits that was effective July 16, 2023, Iowa Workforce Development set the weekly benefit amount at \$265.00. IWD paid the claimant \$795.00 in benefits for the three weeks between July 30, 2023 and August 19, 2023. The "base period" for purposes of the July 16, 2023 original claim consists of the second, third and fourth quarters of 2022 and the first quarter of 2023. Because The Main Event did not pay wages to the claimant during the first quarter of 2023, this employer is not a base period employer and cannot be charged for benefits during the benefit year that started July 16, 2023.

On August 2, 2023, an Iowa Workforce Development Benefits Bureau deputy attempted to hold a fact-finding interview. There was an issue with employer's phone number that delayed the employer's participation in the fact-finding interview to a subsequent day. The deputy was eventually able to speak with the employer about the employment separation. In addition to making a verbal statement, the employer provided the deputy copies of text messages and handwritten letters the employer had received from the claimant during the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(9) Excessive unexcused tardiness or absenteeism.

...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

- a. For the purposes of this rule, “misconduct” is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee’s contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

...

(9) Excessive unexcused tardiness or absenteeism.

...

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 Iowa Admin. Code r.871 -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 Iowa Admin. Code r. 871-24.32(4).

Iowa Administrative Code rule 871-24.32(9) provides:

24.32(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant’s unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

Iowa Code section 96.5(12) provides:

12. Supplemental part-time employment. If the department finds that an individual is disqualified for benefits under subsection 1 or 2 based on the nature of the individual's separation from supplemental part-time employment, all wages paid by the supplemental part-time employer to that individual in any quarter which are chargeable following a disqualifying separation under subsection 1 or 2 shall not be considered wages credited to the individual until such time as the individual meets the conditions of requalification as provided for in this chapter, or until the period of disqualification provided for in this chapter has elapsed.

The evidence in the record does not support a conclusion that the Main Event employment was part-time supplemental. The claimant asserts the work at Rosy's Watering Hole was not employment. The weight of evidence indicates the Rosy's Watering Hole work was employment, but not "insured work" within the meaning of the law. In addition, the number of work hours at Rosy's indicates it was a part-time job.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(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.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330 (Iowa 1988) and *O'Brien v. Employment Appeal Bd.*, 494 N.W.2d 660 (1993).

The evidence in the record establishes discharge for excessive unexcused absences. The employer took the claimant off the schedule indefinitely effective July 9, 2023, based on the claimant's attendance. The claimant reasonably concluded she was discharged from the employment. The evidence indicates three unexcused absences within a five-week period, on June 3, June 4 and July 8, 2023. On those dates, the claimant was absent for personal reasons unrelated to illness. The evidence establishes additional absences that were due to the claimant's need to assist her ill son who resided with the claimant. The claimant's son's illness, coupled with the proper notice to the employer, made these additional absences excused absences under the applicable law. The three unexcused absences in the course of five weeks were excessive and demonstrated an intentional and substantial disregard of the employer's interests. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements.

Iowa Code section 96.3(7) provides in relevant part as follows:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1)

(a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers. If the department determines that an employer's failure to respond timely or adequately was due to insufficient notification from the department, the employer's account shall not be charged for the overpayment.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

The claimant received \$795.00 in benefits for the three weeks between July 30, 2023 and August 19, 2023, but this decision disqualified the claimant for those benefits. The benefits the claimant received are an overpayment of benefits.

Iowa Administrative Code rule 871-24.10(1) and (4), regarding employer participation in fact-finding interviews, provides as follows:

Employer and employer representative participation in fact-finding interviews.

24.10(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted

if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

...
(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

The employer participated in the fact-finding interview. The deputy's notes and the employer's testimony reflect that the employer eventually spoke directly with the deputy and providing supporting documentation for the deputy's consideration. Because the employer participated in the fact-finding interview, 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.

DECISION:

The August 7, 2023 (reference 01) decision is reversed. The claimant was discharged for misconduct in connection with the 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 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$795.00 in benefits for the three weeks between July 30, 2023 and August 19, 2023. 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.



James E. Timberland
Administrative Law Judge

September 13, 2023
Decision Dated and Mailed

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APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

AN APPEAL TO THE BOARD SHALL STATE CLEARLY:

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.