

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHERRI HOARD**  
Claimant

**APPEAL NO: 09A-UI-13609-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**APPLE CORPS LP**  
Employer

**OC: 08-09-09**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 10, 2009, reference 01, decision that denied benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on October 7, 2009, and continued on January 22, 2010. The claimant was present October 7, 2009, but did not participate in the hearing held January 22, 2010. Marc Van Buren, Regional Manager and Scott Simmons, General Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Fourteen were admitted into evidence.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as part-time server for Applebees from October 2, 2008 to August 13, 2009. She was discharged for attendance, insubordination and failure to follow the employer's rules. On January 11, 2009, the claimant argued with and directed profanity toward the manager on duty after being questioned about eating a meal after being released from her shift that day (Employer's Exhibit Six). The claimant said she had a "fucking card" for a free meal and the manager on duty sent her home (Employer's Exhibit Six). On January 12, 2009, the employer suspended the claimant for one week for having two previous warnings for insubordination (Employer's Exhibit Five). On June 6, 2009, the employer spoke to the claimant about her attendance, including the fact she was tardy 17 out of her previous 34 shifts. On July 23, 2009, the claimant received a written warning for mixing up two credit cards at a table and charging the wrong amount to the wrong guest, with one guest that was to pay \$36.05 charged \$63.81 and vice versa (Employer's Exhibit Seven). The employer credited the guest's card that was overcharged and because the employer lost that amount in the transaction the claimant was required to repay the employer \$27.76 in reimbursement for the amount overcharged and the employer gave the guest two free meal cards (Employer's Exhibit Seven). On November 23, 2008, the claimant received her first offense written warning for calling in to

report she was ill but failing to call in the required two hours before the start of her shift (Employer's Exhibit Four). While the manager was explaining the policy to her over the phone the claimant became angry and swore at the manager (Employer's Exhibit Four). On July 17, 2009, the claimant was tardy. She arrived for her 4:30 p.m. shift at 5:05 p.m. because her alarm did not go off (Employer's Exhibit Three). She received a written warning which stated that further incidents could result in suspension or termination (Employer's Exhibit Three). On August 11, 2009, the claimant's boyfriend, who also worked for the employer, called in at 4:22 p.m. and told the employer they had just gotten up and noticed they had flat tire and "if they showed up at all it would be between 5:00 and 6:00 p.m. instead of on time for their 4:30 p.m. shift and questioned whether it was worth it for them to even come in (Employer's Exhibits One and Ten). The employer asked them to come in anyway but they did not call back or show up. The employer noted that even had the claimant and her boyfriend not had a flat tire they still would have been late because they lived 20 to 30 minutes from the restaurant (Employer's Exhibits One and Ten). On August 12, 2009, the claimant was a no-call/no-show for her 5:00 p.m. shift (Employer's Exhibit One). She called at 9:00 p.m. and told the manager she should have called her to tell her she was scheduled. After reviewing the claimant's pattern of behavior the employer terminated the claimant's employment (Employer's Exhibit One). The claimant's boyfriend's employment was also terminated at that time and he admitted they did not have a flat tire August 11, 2009, but rather overslept.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

871 IAC 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant received six written warnings, including a one week suspension, during the last nine months of her employment and rather than showing improvement the claimant's behavior remained stagnant if not showing a decline. Most of the warnings were for behavioral issues that were within the claimant's control. Two warnings were for oversleeping which was also within the claimant's control. Additionally, on one occasion when she and her co-worker boyfriend overslept they were dishonest and said they also had a flat tire. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The September 10, 2009, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter of determining the amount of the

overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css