

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

**EMMANUAL DAVIS**  
Claimant

**APPEAL NO. 19A-UI-01131-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NPC INTERNATIONAL INC**  
Employer

**OC: 01/06/19**  
**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 January 31, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on January 11, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on February 22, 2019. Claimant Emmanuel Davis participated. Connie Letts represented the employer and presented additional testimony through Bonita Pevey and Kimberly Lewis. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 2 through 5 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 unemployment insurance 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: Emmanuel Davis was employed by NPC International, Inc., doing business as Pizza Hut, as a part-time cook and maintenance employee at the employer's Independence restaurant from December 2017 until January 10, 2019, when Connie Letts, General Manager, discharged him from the employment for attendance. Ms. Letts was Mr. Davis' supervisor throughout the employment. Shift Manager Michael Potter also supervised Mr. Davis' employment. Mr. Davis' usual work hours were 4:15 p.m. to close on Monday, and 5:15 p.m. to close on Wednesday

through Saturday. The restaurant closed at 9:00 p.m. on Monday through Thursday and at 10:00 p.m. on Friday and Saturday.

The employer has a written attendance policy that is set forth in an employee handbook. The employer provided Mr. Davis with a handbook at the start of the employment and reviewed the attendance policy with Mr. Davis at that time. Under the written attendance policy, Mr. Davis was required to call the workplace at least two hours prior to the start of the employment and speak with a manager if he needed to be absent or late. At the start of the employment, Ms. Letts told Mr. Davis that she had the additional expectation that Mr. Davis would take steps to secure his own replacement if he needed to be absent from work.

Ms. Letts decision to discharge Mr. Davis from the employment followed a series of absences in January 2019. On Wednesday, January 2, Mr. Davis was absent for personal reasons and notified Mr. Potter at 5:00 p.m. that he would be absent from his 5:15 p.m. shift. Mr. Davis worked his shift on Thursday, January 3. On January 4, Mr. Davis was absent for personal reasons without notice to the employer. On January 9, Mr. Davis was absent for personal reasons and notified Mr. Potter at 4:57 p.m. On January 10, Mr. Davis appeared for work 15 minutes late for this 5:15 p.m. without notice to the employer that he would be late. At that time, Ms. Letts notified Mr. Davis that he was discharged for attendance.

In making the decision to discharge Mr. Davis from the employment, Ms. Letts considered an additional absence on December 8, when Mr. Davis was again absent for personal reasons and failed to notify the employer. In connection with Mr. Davis' absence from that shift, Ms. Letts presented Mr. Davis with a written reprimand, but Mr. Davis refused to sign the reprimand. Ms. Letts had also prepared additional disciplinary notes on January 2 and 5, which she presented to Mr. Davis for his signature, but Mr. Davis refused to sign the notes.

Mr. Davis established an original claim for unemployment insurance benefits that was effective January 6, 2019. Iowa Workforce Development set Mr. Davis' weekly benefit amount at \$87.00. Mr. Davis received \$685.00 benefits for eight weeks between January 6, 2019 and March 2, 2019. NPC International is a base period employer for purposes of the claim.

On January 30, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Davis' separation from the employment. No one from NPC International and no employer representative with personal knowledge of Mr. Davis' employment participated in the fact-finding interview. Instead, Bonita Pevey, an Equifax Unemployment Consultant told the deputy only that Mr. Davis was a no-call/no-show after January 7, 2019. Ms. Pevey did not have anyone with personal knowledge of the employment on stand-by to participate in the fact-finding interview. On January 29, Equifax Unemployment Claim Specialist Tilinia Davidson submitted two documents for consideration at the fact-finding interview. One of those documents was an Equifax letter, dated January 29, 2019, that provided dates of employment, that named Ms. Pevey as the employer's representative for the fact-finding interview, that stated Mr. Davis' job title as "production," and that provided the following summary statement: "Claimant took unscheduled days off and consistently arrived to work late causing workflow disruption, staff shortage and a negative impact on customer service." The second document Equifax submitted on January 29 consisted of the handwritten reprimands Ms. Letts prepared on January 2 and 5. On January 25, Equifax had submitted an electronic protest on behalf of the employer. The protest information was limited to dates of employment, job title, indicating that Mr. Davis was discharged for attendance and the same cursory and somewhat misleading statement that Mr. Davis "was no call, no show for scheduled shifts after last day worked on 1/7/19." Mr. Davis participated in the fact-finding interview and provided a verbal statement to the deputy that included intentionally misleading information. Mr. Davis told the deputy he had not received any warnings for attendance. Mr. Davis knew at the time he provided that information to the deputy that the information was false.

## 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).

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. The weight of the evidence in the record established unexcused absences on December 8, 2018 and on January 2, 4 and 9, 2019. The December 8 and January 4 absences were no-call/no-show absences. The January 2 and 9 absences were absences for personal reasons that included untimely notice to the employer. All four absences were unexcused absences under the applicable law. The unexcused absences were excessive. The absences occurred in the context of multiple warnings for attendance. Mr. Davis is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Davis 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Davis received \$685.00 benefits for eight weeks between January 6, 2019 and March 2, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Davis received constitute an overpayment of benefits.

Iowa Administrative Code rule 817-24.10(1) defines employer participation in fact-finding interviews 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 un rebutted 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.

The employer's cursory documentation and Ms. Pevey's cursory statement to the deputy did not meet the employer fact-finding interview participation requirement. However, because Mr. Davis provided intentionally misleading information at the fact-finding interview, he is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Davis.

**DECISION:**

The January 31, 2019, 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 he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$685.00 benefits for eight weeks between January 6, 2019 and March 2, 2019. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs