IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DUSTIN W HATCHEL
Claimant

WAL-MART STORES INC
Employer

APPEAL NO. 14A-UI-07824-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/29/14
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 July 21, 2014, 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. After due notice was issued, a hearing was held on August 20, 2014. Claimant Dustin Hatchel participated. Anthony Lai represented the employer represented the employer and presented additional testimony through Ryan Flanery. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant. 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. Exhibits One, Two and Three were received into evidence.

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 for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dustin Hatchel was employed by Wal-Mart in Cedar Rapids as a full-time tire lube express (TLE) technician from 2009 until July 3, 2014, when Store Manager Jeff Frase discharged him from the employment. Mr. Hatchel's immediate supervisor was Assistant Manager Timothy Shane.

The incident that triggered the discharge occurred on June 24, 2014. On that day, a customer who purchased a set of new tires left his old tires in the possession of the Wal-Mart TLE shop. Wal-Mart ordinarily charges a customer a fee for recycling old tires. Wal-Mart then sells the

tires in bulk to a vendor. On June 24, a former Wal-Mart TLE manager, Ricky, was loitering at the TLE shop. According to Mr. Hatchel's written statement to the employer, Ricky represented to the TLE staff that he knew the customer who had left the tires and that the customer said he could have two of the tires. Mr. Hatchel agreed to mount the tires on Ricky's vehicle without charge in exchange for Ricky's promise to buy Mr. Hatchel beer. Mr. Hatchel mounted the tires on Ricky's vehicle. Ricky purchased beer in the Wal-Mart store and gave it to Mr. Hatchel. Mr. Hatchel accepted the beer and took it home with him later that day. No one in the TLE shop generated a transaction record concerning the tires that Mr. Hatchel had placed on Ricky's vehicle. Mr. Hatchel was well aware of Wal-Mart's TLE procedures and knew that he was to use his badge to document and certify any work he performed for the employer. Mr. Hatchel did not document anything regarding the transaction with Ricky.

Asset Protection Associate Luke Sharp happened to be in TLE shop on June 24 and overheard the conversation between Ricky and Mr. Hatchel about the deal they had struck. Mr. Sharp reviewed surveillance video to confirm that two tires had been removed from the area where the employer stored used tires and that the tires had been mounted on Ricky's car without payment or record of a sales transaction for the tires or the labor. Mr. Sharp brought the matter to the attention of the store management. Asset Protection Manager Anthony Lai and other members of management reviewed the surveillance that documented the tires being removed from storage, being mounted on Ricky's vehicle and the alcohol exchange between Ricky and Mr. Hatchel.

On July 3, 2014, Asset Protection Manager Jeff Barker interviewed Mr. Hatchel and other TLE employees. Mr. Lai was present for that interview. In connection with the interview, Mr. Hatchel provided a voluntary written statement as follows:

> I work at Walmart (TLE) 2716 for the last 4 ½ years I'm in here talking to asset protection about used tires that come up missing and old manager was hanging out by the shop said he knew the customer who was getting 4 new tires and that customer said he could have 2 of the tires. So we gave him 2 of the tires and he gave us beer in return for putting the tires on. It was wrong and I am sorry I didn't think about it at the time and it will never happen again. It was bad judgment on my part I should of went to manager to see if it was ok. I have seen people do this in the past. There was a few times I have taken deli food due to lack of funds and I'm sorry. I will think before I act next time.

Wal-Mart discharged Mr. Hatchel from the employment after Mr. Hatchel was interviewed.

Mr. Hatchel established a claim for unemployment insurance benefits that was effective June 29, 2014 and received $2,232.00 in benefits for the period of June 29, 2014 through August 23, 2014.

On July 18, 2014 an Iowa Workforce Development claims deputy conducted a fact-finding interview concerning Mr. Hatchel's separation from Wal-Mart. The employer had appropriate notice of the proceeding. The employer, and the employer's representative of record, Equifax Workforce Solutions, did not have anyone appear or provide a statement at the fact-finding interview. The employer provided documentation that included the exit interview documentation, Mr. Hatchel's written statement. The exit interview provides no details regarding the basis for the discharge. Equifax provided a letter, in question and answer format, but that letter fails to set forth specifics regarding why Mr. Hatchel was discharged.

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).

The evidence in the record establishes that Mr. Hatchel knowingly and intentionally violated established Wal-Mart policies and procedures by conspiring with a former Wal-Mart employee to misappropriate Wal-Mart property, the used tires left by the customer. Mr. Hatchel knowingly and intentionally violated established Wal-Mart policies and procedures, and denied the employer revenue is was due for services performed, by mounting the tires on the former Wal-Mart employee's car free of charge in exchange for beer. The weight of the evidence indicates that neither Mr. Hatchel nor anyone else involved had any intention to charge Ricky the appropriate fee for the work or to document the transaction so that Wal-Mart could seek payment for the work. Mr. Hatchel provided testimony at the hearing that is at odds with the voluntary written statement that he provided to the employer. In the written statement, Mr. Hatchel concedes the misconduct. In Mr. Hatchel's testimony, he asserted that he lacked knowledge regarding whether Ricky was charged and that documenting the transaction was a coworker's responsibility. The weight of the evidence indicates that Mr. Hatchel's written statement is the more credible piece of evidence. The transaction that took place on June 24 was the sort of transaction that occurs between friends. The weight of the evidence indicates that Mr. Hatchel knew what he was doing was wrong at the time, that it violated Wal-Mart policy, and that he was gaining a windfall, the beer, at Wal-Mart's expense, the lost revenue. Mr. Hatchel's conduct was in willful and wanton disregard of the employer's interests and constituted misconduct in connection with the employment. Mr. Hatchel 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 employer's account shall not be charged for benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 $2,232.00 in benefits for the period of June 29, 2014 through August 23, 2014.

Iowa Administrative Code rule 817 IAC 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 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.

The documentation provided by the employer for the fact-finding interview lacked the particulars of why Mr. Hatchel had been discharged from the employment and was not enough to prove misconduct in the absence of a rebuttal. The employer did not participate in the fact-finding interview within the meaning of the law and will not be relieved of liability for benefits paid to the claimant up to this point. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The claims deputy's July 21, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in 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 $2,232.00 in benefits for the period of June 29, 2014 through August 23, 2014. The claimant is not required to repay the benefits. The employer's account may be charged for the benefits already paid to the claimant, but will not be charged for future benefits in connection with the claim.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/css