

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHANDLER M TUCKER**  
Claimant

**APPEAL NO. 17A-UI-00738-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FRANK MILLARD & CO INC**  
Employer

**OC: 12/18/16**  
**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 January 11, 2017, 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, based on an agency conclusion that the claimant had been discharged on November 12, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on February 10, 2017. Claimant Chandler Tucker did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Diana Perry-Lehr of Employers Unity represented the employer and presented testimony through Melissa Silvia, Brian Tucker, Joe Lindquist and Diana McCannon. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibit 1 into evidence. The administrative law judge took official notice of the fact-finding materials.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the claimant has been overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid 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: The employer is a construction contracting company. Chandler Tucker was employed by Frank Millard & Company, Inc. as a full-time laborer from January 2016 until December 7, 2016, when Joe Lindquist, Pipefitter Superintendent, discharged him from the employment. Foreman Brian Tucker was Chandler Tucker's supervisor. Brian Tucker is Chandler Tucker's uncle. The employer assigned Chandler Tucker to assist a painting crew in Muscatine on Saturday,

December 5 and Sunday, December 6, 2016. Chandler Tucker performed the assigning work on Saturday, December 5, but did not appear for work on Sunday, December 6. On Monday, December 7, Chandler Tucker dishonestly reported to Brian Tucker that he had worked six hours on Sunday, December 6. When Mr. Lindquist checked with the painting foreman to determine how to document Chandler Tucker's work for payroll purposes, he learned that Chandler Tucker had in fact not performed any work for the employer on December 7. When Brian Tucker and Mr. Lindquist confronted Chandler Tucker, Chandler Tucker reiterated that he had worked six hours on Sunday, December 6, 2016.

Chandler Tucker established a claim for unemployment insurance benefits that was effective December 18, 2016. Frank Millard & Company is Mr. Tucker's sole base period employer. Mr. Tucker received \$1,476.00 in unemployment insurance benefits for the four-week period of December 18, 2016 through January 14, 2017.

On January 6, 2017, a Workforce Development claims deputy held a fact-finding interview to address Chandler Tucker's separation from the employer. Mr. Tucker participated. Melissa Silvia, a Claims Specialist from Employers Unity, represented the employer. No one from Frank Millard & Company participated. Ms. Silvia provided an oral statement in which she indicated that Mr. Tucker had been discharged on November 7 for submitting a padded timecard for representing that he had worked, when the employer asserted he had not worked.

#### **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).

The evidence in the record establishes that Chandler Tucker was discharged on December 7, 2016 for misconduct in connection with the employment. The evidence establishes that Mr. Tucker knowingly and intentionally misrepresented to the employer that he had worked six hours on Sunday, December 6, 2016, knowing that the employer would use that information to determine his wages. Mr. Tucker's dishonesty demonstrated an intentional and substantial disregard of the employer's interests. Mr. Tucker 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. Tucker 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.

Chandler Tucker received benefits, but has been denied benefits as a result of this decision. Accordingly, Mr. Tucker is overpaid \$1,476.00 in unemployment insurance benefits for the four-week period of December 18, 2016 through January 14, 2017. The employer representative's participation in the fact-finding met the minimum requirement for participation. For that reason,

the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits paid to the claimant, including liability for benefits already paid.

**DECISION:**

The January 11, 2017, reference 01, decision is reversed. The claimant was discharged on December 7, 2016 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,476.00 in unemployment insurance benefits for the four-week period of December 18, 2016 through January 14, 2017. The claimant must repay the benefits. The employer's account will be relieved of liability for benefits paid to the claimant, including liability for benefits already paid.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs