

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT T KIRTLEY
Claimant

APPEAL NO. 13A-UI-12090-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

O'REILLY AUTOMOTIVE INC
Employer

OC: 09/15/13
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 October 18, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 20, 2013. Claimant Robert Kirtley participated. Tim Mason represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Eight into evidence.

The parties stipulated that the employer had participated in the fact-finding interview that led to the October 18, 2013, reference 01, decision that allowed benefits.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Kirtley was employed by O'Reilly Automotive, Inc., as a full-time store manager until September 17, 2013, when Tim Mason, District Manager, discharged him from the employment after Mr. Kirtley's store failed a company procedures audit on September 17, 2013. Mr. Kirtley had started his employment in July 2011 as a parts specialist. Prior to becoming store manager in January 2013, Mr. Kirtley had been an assistant store manager.

During the September 17, 2013 audit, the Loss Prevention Auditor, found many deficiencies and deviations from company practices. These included several issues with inventory management, processing returns, cash and credit card handling, sales tax collection, computer security, alarm security, accounts receivable, employee purchases, store appearance, truck log books and more. As store manager, Mr. Kirtley was responsible for ensuring that each of these matters was addressed in a timely manner according to company practices. Mr. Kirtley had received appropriate training to perform his duties. The Loss Prevention Auditor summoned Mr. Mason to Mr. Kirtley's store to review the audit. When Mr. Mason questioned Mr. Kirtley about the

many deficiencies and deviations from company practices, Mr. Kirtley's primary response was that he was tired. While the store had been running short-staffed due to bad hiring decisions Mr. Kirtley had made, the staffing issues did not explain the many instances in which Mr. Kirtley had failed to adhere to company practices.

The failed audit in September 2013, followed a failed audit on July 2013. At the time of the earlier audit, Mr. Mason had reviewed company policies and his expectations with Mr. Kirtley. Mr. Mason had placed Mr. Kirtley on probation. Passing a re-audit was a specific term of the probation.

Mr. Kirtley established a claim for benefits that was effective September 15, 2013 and received \$2,879.00 in benefits for the period of September 15, 2013 through November 23, 2013.

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.

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 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 findings of fact is but a summary of the very detailed evidence the employer presented concerning the many deficiencies noted during the September 17, 2013 re-audit. That testimony indicated that Mr. Kirtley had in many instances between the July audit and the September re-audit failed to comply with even the basics of the employer's policies. The staffing issues did not explain or excuse the many failures to comply with the basics of the employer's policies. The many problems revealed in the final audit were sufficient to establish a pattern of negligence on the part of Mr. Kirtley. That the employer found similar issues two months earlier further supports the conclusion that the pattern of negligently operating the employer's business had begun prior to the July audit. Mr. Kirtley's pattern of negligence was sufficient to indicate a willful disregard of the employer's interests. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kirtley was discharged for misconduct. Accordingly, Mr. Kirtley 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 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. Because this decision disqualifies Mr. Kirtley for benefits, the \$2,879.00 in benefits for the period of September 15, 2013 through November 23, 2013 constitutes an overpayment of benefits.

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.

Because the employer participated in the fact-finding interview, Mr. Kirtley is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The Agency representative's October 18, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$2,879.00 in benefits for the period of September 15, 2013 through November 23, 2013. The claimant must repay that amount.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs