

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOT WEYHRACH

Claimant

APPEAL NO. 14A-UI-10855-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WAL-MART STORES INC

Employer

OC: 09/14/14

Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 9, 2014, reference 02, decision that allowed benefits to the claimant, provided he was otherwise eligible, and that held the employer's account could be charged; based on an Agency conclusion that the claimant was discharged for no disqualifying reason. After due notice was issued, a hearing was held on November 3, 2014. Claimant Scot Weyhrauch participated. Adam Hass represented the employer and presented additional testimony through Jacqueline Clair and Ryan Flanery. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purposes of determining whether the employer participated in the fact-finding interview and whether the claimant engaged in fraud or dishonesty 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 is overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits paid to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Scot Weyhrauch was employed by the Windsor Heights Sam's Club as a full-time tire tech from 2012 until September 16, 2014 when Adam Hass, Asset Protection Manager, discharged the claimant from employment for theft of a customer's personal property, namely approximately \$800.00 in coins.

The incident that triggered the discharge occurred on September 11, 2014. On that day a customer brought her car to the Windsor Heights Sam's Club for a tire repair. Mr. Weyhrauch was on duty, as were Tire Tech Eric Rasmussen and Team Lead Chas Waltz. The customer was initially interested in a tire patch, but the tech staff determined it was not possible to patch the tire. Mr. Waltz opened the trunk of the customer's car in search of a spare tire. Mr. Weyhrauch was with Mr. Waltz at the time. Mr. Rasmussen was standing nearby. All three observed that the customer had a substantial amount of personal property in the trunk. Included in that personal property were blue zippered bank bags containing a large amount of change. Mr. Weyhrauch opened one of the bags and observed the coinage inside. Mr. Weyhrauch had no reason or authority to open the bank bag. Mr. Weyhrauch cites curiosity as the reason he accessed one or more of the customer's bank bags without authorization. When Mr. Waltz observed the amount of personal property in the truck, he determined it was best to forgo retrieving the spare tire from the truck. Mr. Waltz closed the trunk. Mr. Weyhrauch put the original tire back on the vehicle and filled the tire with air. Mr. Weyhrauch then drove the customer's car back behind the Wal-Mart next door, ostensibly to reset an automatic tire pressure monitor. Mr. Weyhrauch drove the customer's car to a place on the employer's property that was not covered by the employer's video surveillance system. Mr. Weyhrauch was then off-camera for approximately two minutes. Mr. Weyhrauch then drove the customer's car back to the tire area of the Sam's Club and parked the customer's car. Mr. Weyhrauch then immediately walked to his own vehicle, ostensibly to retrieve a container of soda. Mr. Weyhrauch had in fact accessed the customer's vehicle while he was off-camera, had taken one or more of the customer's coin-filled bank bags into his possession, and had placed the bag or bags in his car. All of this occurred right before Mr. Weyhrauch was scheduled to get off work at 3:30 p.m. When Mr. Weyhrauch returned to the employer's shop, Mr. Rasmussen joked with him about stealing the customer's money and Mr. Weyhrauch responded that the customer should have used the money to buy a new tire.

When Mr. Weyhrauch finished his shift, he took the customer's coinage to a nearby Hy-Vee and exchanged it for currency. Mr. Weyhrauch then used the customer's money to gamble at Prairie Meadows.

The customer had discovered the missing coinage immediately upon receiving her car back from the Sam's Club shop staff. The customer summoned the Windsor Heights police and provided a statement. The customer also reported the loss of coinage to Mr. Hass. When questioned by the employer, Mr. Weyhrauch admitted to taking money from the customer's trunk, exchanging it for currency at a nearby Hy-Vee and gambling with the money at a local casino.

Mr. Weyhrauch established a claim for benefits that was effective September 14, 2014 and has received \$2196 in benefits for the period of September 14, 2014 through November 8, 2014.

Ryan Flanery of Equifax represented the employer at the fact-finding interview and provided documentation from the employer that set forth the particulars of the basis for the claimant's discharge.

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 Mr. Weyhrauch stole money from a Sam's Club customer and converted the money to his personal use. While no one saw Mr. Weyhrauch take the money into his possession, there is strong circumstantial evidence indicating that Mr. Weyhrauch did indeed take the money and convert it to his use. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Weyhrauch was discharged for misconduct. Accordingly, Mr. Weyhrauch 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 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.

Iowa Administrative Code rule 817 IAC24.10(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 claimant received benefits, but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2196 in benefits for the period of September 14, 2014 through November 8, 2014. The employer participated in the fact-finding interview by presented sufficient written evidence to establish misconduct in connection with the employment if the evidence were un rebutted. Because the employer participated, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid to the claimant.

DECISION:

The October 9, 2014, reference 02, 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 \$2196 in benefits for the period of September 14, 2014 through November 8, 2014. The claimant must repay that amount. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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