

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN T KOUNKEL
Claimant

APPEAL NO. 16A-UI-10292-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**KIRKWOOD COMMUNITY COLLEGE
– AREA 1**
Employer

OC: 08/28/16
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 September 19, 2016, 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 August 26, 2016 for no disqualifying reason. The hearing in this matter was original set for October 5, 2016. Claimant Nathan Kounkel appeared on October 5. The employer appeared on October 5 through Sheri Hlavacek and Jacob Larson. On October 5, Mr. Kounkel indicated he had been temporarily displaced by the flood evacuation in Cedar Rapids and, therefore, had not received adequate notice of the appeal hearing. The administrative law judge found good cause to reschedule the hearing. The appeal hearing was rescheduled to 9:00 a.m. on October 18, 2016 and formal notice was mailed to the parties on October 6, 2016. At the time of the October 18, 2016 hearing, Mr. Kounkel was not available at the number he had registered for the hearing. On October 18, Ms. Hlavacek represented the employer and presented additional testimony through Jacob Larson. Exhibits One through Four were received into evidence. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and 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 was overpaid benefits.

Whether the claimant must 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: Nathan Kounkel was employed by Kirkwood Community College as the full-time Restaurant and

Beverage Manager of The Class Act Restaurant located in the Hotel at Kirkwood Center from October 2015 until August 26, 2016, when Nick Wymore, Director of Food and Beverage, discharged him from the employment. Mr. Wymore was Mr. Kounkel's immediate supervisor.

The employer's decision to discharge Mr. Kounkel was based on Mr. Kounkel's decision to violate the Fair Labor Standards Act (FLSA) and the employer's policies and practices. On August 11, 2016, server Ryan Helton did not want to work his assigned hours. Server Chance Cahill wanted to pick up Mr. Helton's assigned hours, but was already at 40 hours for the week. The additional hours would place Mr. Cahill into overtime status. Mr. Helton and Mr. Cahill asked Assistant Manager Molly Rodriguez to authorize the proposed scheduled change. Ms. Rodriguez did not authorize the proposed change because it would place Mr. Cahill in overtime status. Ms. Rodriguez told Mr. Kounkel that she had denied the request and asked Mr. Kounkel to support her decision. Mr. Kounkel instead suggested to Mr. Cahill and Mr. Helton that they enter into a surreptitious arrangement whereby Mr. Helton would be allowed to go home as requested and Mr. Cahill would work off the clock. Mr. Kounkel directed Mr. Helton to remain clocked in, despite his departure from the restaurant, so that Mr. Cahill could use Mr. Kounkel's service ID and payroll status to work the additional hours without creating a record of the overtime work. When Ms. Rodriguez expressed concern at Mr. Cahill working the additional hours, Mr. Kounkel told her not to worry about it. Another supervisor, Jacob Larson, knew about the arrangement at the start of the dinner service, but deferred taking action on the matter until five days later. Mr. Kounkel was the highest ranking manager on duty at the time of the policy violation. Mr. Kounkel was Ms. Rodriguez's and Mr. Larson's immediate supervisor.

On August 16, Mr. Larson notified the employer of the policy violation and Sheri Hlavacek, Human Resources Supervisor, commenced her investigation. Ms. Hlavacek interviewed all of the staff members involved. Each provided information establishing that Mr. Kounkel had proposed and authorized the policy and labor law violation. On August 25, Ms. Hlavacek interviewed Mr. Kounkel. At that time, Mr. Kounkel conceded knowledge of the violation as it was occurring, but denied having proposed the violation.

Mr. Kounkel established a claim for unemployment insurance benefits that was effective August 28, 2016 and received \$2,235.00 in benefits for the five-week period of August 28, 2016 through October 1, 2016.

On September 15, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Kounkel's separation from the employment. Sue Bennett, Compensation & Benefits Administrator, represented the employer at the fact-finding interview. At the time of the fact-finding interview, Mr. Kounkel provided an intentionally dishonest statement in which he denied knowledge, involvement, or responsibility in connection with the August 11 policy and labor law violation.

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. Kounkel did indeed knowingly and intentionally violate the employer's labor and compensation policies and federal labor law on August 11, 2016. The weight of the evidence establishes that Mr. Kounkel proposed the violation,

authorized the violation, and recruited subordinate staff to participate in the violation. Mr. Kounkel knew at the time that he was violating the employer's policies and federal labor law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kounkel was discharged for misconduct. Accordingly, Mr. Kounkel 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. Kounkel 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.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$2,235.00 in benefits for the five-week period of August 28, 2016 through October 1, 2016. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability, including liability for benefits already paid.

DECISION:

The September 19, 2016, 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 amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$2,235.00 in benefits for the five-week period of August 28, 2016 through October 1, 2016. The claimant is required to repay the overpayment. The employer's account is relieved of liability, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs