

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LEROY J ROSS
Claimant

APPEAL NO. 14A-UI-07730-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICOLD LOGISTICS LLC
Employer

**OC: 06/15/14
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 16, 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 for benefits. After due notice was issued, a hearing was held on August 19, 2014. Claimant Leroy Ross participated. Emily Yount of Equifax Workforce Solutions represented the employer and presented testimony through David Campbell. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Six and Eight through Eleven 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 must 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: Leroy Ross was employed by Americold Logistics, L.L.C., as a full-time meat room sanitation worker from 2012 until June 17, 2014, when David Campbell, Operations Manager, discharged him from the employment in connection with a violation of the lock-out/tag-out (LOTO) procedure.

The incident that triggered the discharge occurred on June 16, 2014. On that day, Mr. Ross commenced cleaning the meat room before taking any steps to comply with the employer's established LOTO policy and procedure. Mr. Ross had been properly trained in the LOTO policy and procedure and had been issued equipment so that he could comply with the policy and procedure. Mr. Ross had, at minimum, sprayed the meat room with hot water before

placing a lock on the electrical panel that controlled the flow of electricity to the meat room. The meat room contained electricity-powered machinery. The employer's LOTO policy and procedure was in place to prevent Mr. Ross or others from being electrocuted during the cleaning process. On June 16, Mr. Campbell and Stacy Hopper, General Manager, walked past the meat room after Mr. Ross had started to clean it and noticed steam coming from the meat room. The encountered Mr. Ross, who was at that time completing another task in the hallway adjacent to the meat room. Mr. Campbell and Ms. Hopper observed that the electrical panel that Mr. Ross' should have locked out as part of the LOTO process did not have any locks on it. Mr. Campbell used his cell phone to document the absence of a lock on the electrical panel.

Months earlier, the employer had started the process of disciplining Mr. Ross for similar failure to follow the LOTO policy and procedure. It was then determined that the employer had not implemented a protocol specific to the piece of machinery involved. The employer abandoned the discipline. The employer established a protocol for the particular piece of machinery. The employer trained Mr. Ross and others in the protocol.

At the time Mr. Campbell and Ms. Hopper passed by the meat room, they were enroute to address another matter. Within five minutes, they returned to find Mr. Ross next to the electrical panel. Mr. Ross had just placed a lock on the electrical panel. Mr. Campbell confronted Mr. Ross about not having placed a lock on the panel before he commenced spraying water in the meat room. Mr. Ross asserted that he had followed the LOTO procedure. Mr. Ross had in fact not followed the LOTO procedure. Mr. Campbell told Mr. Ross not to lie to his face. Mr. Ross accused Mr. Campbell of being the liar. A union steward was nearby and became involved in the matter. Mr. Campbell explained the situation to the steward and showed the steward the photos he had taken moments before. Mr. Campbell and Ms. Hopper then suspended Mr. Ross for the day. The employer had Mr. Ross return the next day and discharged him from the employment at that time.

Mr. Ross established a claim for benefits that was effective June 15, 2014 and has received \$3,832.00 in benefits for the period of June 15, 2014 through August 23, 2014.

The employer did not provide a person to make a statement at the July 15, 2014 fact-finding interview. However, the employer provided for that proceeding all of the exhibits that the employer submitted for the appeal hearing. Those materials set forth in details the particulars of the incident that led to the discharge. Those materials contain written statements from Mr. Campbell and Ms. Hopper drafted close in time to the incident in question.

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. Ross did indeed violate the employer's lock-out/tag-out policy and procedure on June 16, 2014. The evidence further indicates that after Mr. Ross encountered Mr. Campbell and Ms. Hopper that he attempted to mislead the employer into thinking he had followed the policy and procedure by belatedly placing a lock on the electrical panel. Mr. Ross was then intentionally dishonest with the employer when the employer confronted him about not following the LOTO procedure. Mr. Ross's failure to follow the LOTO policy, combined with his attempt to mislead the employer, and his intentional

dishonest are sufficient to indicate a willful and wanton disregard of the employer's interest in providing a safe work environment and safe work procedures. Mr. Ross was discharged for misconduct. Accordingly, Mr. Ross 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. See Iowa Code section 96.3-7(a) and (b). Because this decision disqualifies Mr. Ross for benefits in connection with the separation from the employment, the \$3,832.00 in benefits that Mr. Ross received for the period of June 15, 2014 through August 23, 2014 constitutes an overpayment of benefits. 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 benefits. Because the employer participated in the fact-finding interview, Mr. Ross is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The claims deputy's July 16, 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 is overpaid \$3,832.00 in benefits for the period of June 15, 2014 through August 23, 2014. The claimant must repay that amount. The employer's account will not be charged for benefits paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css