

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TRACY DAVIS
Claimant

B R STORES INC
Employer

APPEAL NO. 19A-UI-07883-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/15/19
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 1, 2019, 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 the deputy's conclusion that the claimant was discharged on August 19, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 29, 2019. Claimant Tracy Davis participated. Donna Bristol represented the employer and presented additional testimony through Jeff Jensen and David Zabel. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 and 2 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 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: B.R. Stores, Inc. owns and operates a Super Saver grocery store in Council Bluffs. Tracy Davis was employed at that store as a full-time produce clerk from 2010 until August 19, 2019, when the employer discharged him for reporting for work on August 18, 2019 in an intoxicated state. The employer's written work rules include a work rule that subjects an employee to possible discharge from the employment if the employee reports for work under the influence of alcohol and/or drugs. Mr. Davis received the written work rules at the start of his employment and was at all relevant times aware of the particular work rule. The employer's work rules do not include a provision for reasonable suspicion drug or alcohol testing. When Mr. Davis reported for work, the produce manager, James Roy, discerned that Mr. Davis appeared to be intoxicated. Mr. Roy summoned Jeff Jensen, who was at that time Assistant Store Director for the Council Bluffs store. Mr. Jensen noted that Mr. Davis' movements were sluggish, that he had difficulty maintaining balance, that he staggered, and that he had glossy eyes. Mr. Jensen noted that when Mr. Davis went to sit down in a chair Mr. Davis struggled and essentially fell into the chair.

When Mr. Jensen told Mr. Davis that he looked like he had just finished drinking and then came to work, Mr. Davis did not respond. Mr. Davis concedes that he had been drinking beer on Saturday, August 17, 2019, but denies drinking alcohol at any point on Sunday, August 18, 2019. When Mr. Davis asked whether Mr. Jensen was sending him home, Mr. Jensen told Mr. Davis that he could not have him working in his current condition. Mr. Jensen then went about other duties and Mr. Davis left the workplace.

After Mr. Davis left the workplace, he did not get far. Within minutes of leaving the workplace, one of the employer's vendors notified the store management that a man was "laid out in the parking lot." Mr. Jensen went to investigate. Mr. Jensen made his way toward Mr. Davis in time to observe emergency personnel from the local fire department and emergency medical service (EMS) evaluating Mr. Davis' condition. At that point, the EMS had moved Mr. Davis to an upright position so that Mr. Davis was sitting on the curb. The EMS worker concluded that Mr. Davis was intoxicated and documented the same. The EMS worker spoke to Mr. Jensen to see whether the employer could arrange to have someone take Mr. Davis home in lieu of having the EMS staff contact law enforcement. Mr. Jensen did not want Mr. Davis to be charged with public intoxication or incarcerated. Mr. Jensen arranged to have Dave Zabel, Night Crew Manager, transport Mr. Davis home. During the ride home in Mr. Zabel's truck, Mr. Davis sat beside Mr. Zabel. Mr. Zabel could smell an odor of alcohol coming from Mr. Davis. During the ride home, Mr. Davis told Mr. Zabel that his daughter had passed away and that he was having a hard time dealing with her passing. When Mr. Davis exited Mr. Zabel's truck, Mr. Zabel watched as Mr. Davis staggered toward the apartment building where he resided.

Mr. Davis implausibly asserts that what the employer determined was alcohol intoxication was actually a response to medication. Mr. Davis advises that he was taking a prescription anti-depressant medication, blood pressure medication, and cholesterol medication. There had been no change in Mr. Davis' medication regimen during the two months that preceded the August 18 incident. Mr. Davis was aware that he was supposed to avoid alcohol while on the anti-depressant medication. Mr. Davis' intoxicated state on the morning of August 18, 2019 was due to alcohol consumption and was not due to a prescription medication.

When Mr. Davis reported for his shift on August 19, 2019, the employer discharged him from the employment.

Mr. Davis established an original claim for benefits that was effective September 15, 2019. Mr. Davis received \$1,750.00 in benefits for the seven weeks between September 15, 2019 and November 2, 2019. B.R. Stores, Inc. is the sole base period employer in connection with the claim.

On September 30, 2019, an Iowa Workforce Development deputy held a fact-finding interview that addressed Mr. Davis' separation from the employment. Donna Bristol, Vice President of Human Resources, represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The evidence in the record establishes a discharge for misconduct in connection with the employment. Iowa Code Section 730.5 provides the authority under which a private sector employer doing business in Iowa may conduct drug or alcohol testing of employees. However, the statute does not require an employer to engage in drug or alcohol testing. See Iowa Code section 730.5(3). The employer reasonably concluded, through the personal observations made by multiple individuals including professional emergency medical personnel, that Mr. Davis was intoxicated due to alcohol consumption at the time he reported for work on August 18, 2019. Mr. Davis' conduct in the workplace, immediately after he left the workplace, and during his trip home were all consistent with alcohol intoxication. The weight of the

evidence does not support Mr. Davis' assertion that his impaired condition was attributable to an adverse reaction to one or more of the prescription medications he had been consistently taking without incident and without dosage change during the preceding two months. Mr. Davis' act of reporting for work in an intoxicated state violated the employer's written work rules, demonstrative a willful and wanton disregard of the employer's interests in maintaining a safe and orderly workplace, and constituted misconduct in connection with the employment. Accordingly, Mr. Davis is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times weekly benefit amount. Mr. Davis 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Davis received \$1,750.00 in unemployment insurance benefits for the seven weeks between September 15, 2019 and November 2, 2019, but this decision disqualifies Mr. Davis for those benefits. Accordingly, the benefits Mr. Davis received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Davis is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The October 1, 2019, reference 01, decision is reversed. The claimant was discharged on August 19, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$1,750.00 in benefits for the seven weeks between September 15, 2019 and November 2, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/scn