IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

COREY L MARTIN
Claimant

ALLSTEEL INC
Employer

APPEAL NO. 14A-UI-13121-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/23/14
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 December 11, 2014, reference 01, decision that allowed benefits and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant was discharged for no disqualifying reason. After due notice was issued, a hearing was held on January 16, 2015. Claimant Corey Martin participated. Steve Zaks of Employer's Edge represented the employer and presented testimony through Tyler Tuttle, Marcos Montalvo, Steve Wilson and Jon Mumma. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, 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 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: Corey Martin was employed by Allsteel, Inc., as a work cell operator from July 2013 until November 26, 2014, when the employer discharged him from the employment. Mr. Martin worked as part of a team of seven employees. Mr. Martin's assigned task was to place product at the end of the production line in boxes and to wrap the boxes with shrink wrap. Tyler Tuttle, Production Group Lead, was Mr. Martin's immediate supervisor.

The final incident that triggered the discharge occurred on November 22. Two employees reported to Team Lead Marcos Montalvo that Mr. Martin was kicking units and breaking boxes. Mr. Montalvo went to speak with Mr. Martin. Mr. Martin was upset because his production line had been assigned to produce a particular office panel that was ordinarily produced on another line. Mr. Martin was concerned that his line would slow down as a result of the particular product being produced at the slower pace would adversely impact his incentive pay. Mr. Martin wanted another production line with less experienced workers to produce the panel. As Mr. Montalvo spoke with Mr. Martin, Mr. Martin said, "Fuck this" and "This is bullshit." The employer's employee handbook required that employees treat other with fairness and respect and warned of discipline if they did not. Mr. Martin gestured like he was masturbating. Mr. Montalvo explained to Mr. Martin that all of the production lines were the same. Mr. Martin asserted that bars on the production line were too narrow and the necessary boxes would not fit. After Mr. Montalvo walked away, he observed Mr. Martin kick and damage an additional box. Mr. Montalvo reported the incident up the chain of command. The employer spoke with Mr. Martin and Mr. Martin denied any inappropriate conduct or damage to product. The employer suspended Mr. Martin pending further investigation. On November 26, 2014, the employer notified Mr. Martin that he was discharged from the employment.

On November 21, 2014, the employer had met with Mr. Martin as a follow up to a written reprimand issued on November 3, 2014. On November 21, the employed received a complaint from another employee who worked with Mr. Martin. The other employee complained about Mr. Martin not keeping up with production and requested to be reassigned. The employer had issued the November 3 written reprimand after Mr. Tuttle directed Mr. Martin to go get some foam needed for the production line and Mr. Martin responded that it was not his job, it was the material handlers' job to go get supplies and bring them to the line, and that Mr. Martin had been told not to leave the line. When Mr. Martin balked at the directive, Mr. Tuttle sent someone else.

Mr. Martin established a claim for benefits that was effective the week that started November 23, 2014 and received $3,006.00 in benefits for the nine-week period between November 23, 2014 and January 24, 2015.

Dara Hallman of Employer's Edge represented the employer at the December 10, 2014 fact-finding interview. Ms. Hallman lacked personal knowledge of the matters that factored in the discharge. The documentation provided by the employer for the fact-finding interview was worded by the employer as rather general statements without specifics of the conduct that factored in the discharge. Ms. Hallman's oral statement and the documentation, taken together, was not enough, even in the absence of rebuttal to indicate misconduct in connection with the employment. Mr. Martin's comments at the fact-finding interview were neither fraudulent nor intentionally misleading.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment

insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior's authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989). The question of whether the use of improper language in the workplace is misconduct is nearly always a fact question. It must be considered with other relevant factors, including the context in which it is said, and the general work environment. See Myers v Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa Ct. App. 1990).

The evidence in the record establishes misconduct in connection with the final incident that triggered the discharge. The weight of the evidence indicates that Mr. Martin did indeed kick boxes that day in response to being assigned to produce a product he did not want to produce. Mr. Montalvo watched Mr. Martin kick and damage a box after other employees had reported similar conduct to Mr. Montalvo that same day. Mr. Martin's conduct amounted to intentional destruction of the employer's property. The weight of the evidence also indicates that Mr. Martin used offensive language and an offensive gesture when speaking to Mr. Montalvo. Mr. Martin told Mr. Montalvo, "Fuck this" and "This is bullshit." Mr. Martin also made a gesture like he was masturbating. All of the conduct was inappropriate and an attack on Mr. Montalvo's authority to direct the work. Mr. Martin was aware at the time he engaged in the conduct that it violated the employer's fairness and respect policy. While the prior incidents were substantially less egregious than the final incident, each demonstrates Mr. Martin's mindset and that pattern of conduct appears to have been escalating over time.

Because Mr. Martin was discharged for misconduct. Mr. Martin 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.

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 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. 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 $3,006.00 in benefits for the nine-week period between November 23, 2014 and January 24, 2015. Ms. Hallman's comments, not based on personal knowledge, and the documentation containing non-specific statements, fell short of constituting participation in the fact-finding interview within the meaning of the law. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the fact-finding interview within the meaning of the law, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits. The employer will not be charged for benefits disbursed to the claimant for the period subsequent to the entry date of this decision.

DECISION:

The December 11, 2014, 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 claimant, therefore, was overpaid $3,006.00 in benefits for the nine-week period between November 23, 2014 and January 24, 2015. Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the fact-finding interview within the meaning of the law, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits. The employer will not be charged for benefits disbursed to the claimant for the period after the entry date of this decision.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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