

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL D CUSTER
Claimant

APPEAL NO. 14A-UI-09006-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CINTAS CORPORATION NO 2
Employer

OC: 08/03/14
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 August 22, 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; based on an Agency conclusion that the claimant had been discharged for no disqualifying reason. After due notice was issued, a hearing was held on October 16, 2014. Claimant Daniel Custer participated. Amber Olsen represented the employer and presented additional testimony through Nikki DeYoung. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three 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: Daniel Custer was employed by Cintas Corporation No. 2 as a full-time supervisor from June 2013 until August 7, 2014 when he was discharged for making unauthorized changes to employee time reporting records. Mr. Custer supervised six full-time employees. Each employee would report his or work time to the employer by swiping an ID badge through a timekeeping device at the workplace. One employee was allowed to submit his initial work time in writing when he either started or ended his shift away from the workplace. All but one employee was paid a base salary plus bonus. One of the employees was paid a straight hourly wage. The employer expected all of the full-time employees to perform full-time work, 40 hours

per week. A couple weeks before the discharge, Nikki DeYoung, Branch Manager, counseled Mr. Custer to make certain that the employees were working full-time hours and to rearrange work duties as necessary to make that happen. The employer did a monthly audit of timekeeping records at the beginning of August 2014. The employer noted that between July 28 and August 1 Mr. Custer had made ten unauthorized changes to the employees' timekeeping records. Nine of the changes were made on August 1, 2014. Six of the changes increased the number of hours documented as work hours. Four of the changes decreased the number of work hours documented.

On July 18, 2014 Amy Olsen, Human Resources Representative, had sent an email message to Mr. Custer about the new hourly employee's failure to clock out at the end of a shift. Ms. Olson told Mr. Custer that the employee would need to complete a time adjustment sheet before Mr. Custer could adjust the employees documented work hours. The employer's policy required employees to complete time adjustment sheets before any changes were made to the employees' documented work hours. The employer had reviewed this requirement with Mr. Custer earlier in the employment.

Mr. Custer established a claim for benefits that was effective August 3, 2014 and received \$4480.00 in benefits for the ten week period of August 3, 2014 through October 11, 2014.

The employer, through its representative of record, had appropriate notice of the August 21, 2014 fact-finding interview. The employer representative Lisa Kubot, of Equifax/Talx, did not answer the phone when the Claims Deputy tried to reach her for the fact-finding interview. The Claims Deputy left a message for Ms. Kubot. The employer has submitted documentation for the fact-finding interview. That documentation included the electronic response to the notice of claim. In that documentation, the employer provided the start date and end date of the employment. The employer also provided a written statement on that document as follows: "The claimant changed timesheets on multiple occasions without authorization from the individuals he managed." The employer also provided for the fact-finding interview copies of the documents that were also received into evidence at the appeal hearing as Exhibits One, Two and Three. In the document that was later labeled Exhibit Three for the appeal hearing, the employer outlined the basis for the discharge. The information in that document, if unrefuted, would have been sufficient to establish misconduct in connection with the employment.

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. Custer knowingly and intentionally manipulated timekeeping records without authorization, to make it look like multiple employees were working more hours than they actually were. Mr. Custer's explanation for his actions does not make sense and are not credible. Mr. Custer asserted that he had been trained to inflate work hours to make it look like employees were working more hours than they did. Mr. Custer asserted that he never questioned that practice in more than a year of employment. The weight of the evidence indicates that Mr. Custer understood that the purpose of the employer's timekeeping

system was to keep an accurate record of the time employees worked. Mr. Custer knew that the employer was specifically concerned with getting full-time work from employees. The weight of the evidence indicates that the employer had reinforced to Mr. Custer in multiple ways at multiple times that any change to an employees work hours must be preceded by a written time adjustment request from the employee. Ms. Olson had just had such a conversation with Mr. Custer a couple weeks prior to the discharge. The weight of the evidence indicates that Mr. Custer intentionally adjusted employee timekeeping records without authorization in response to Ms. DeYoung's directive that Mr. Custer make changes to work assignments to make certain that full-time employees were working full-time hours. Mr. Custer's conduct was in wanton and willful disregard of the employer's interests in accurate timekeeping and labor management.

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

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$4480.00 in benefits for the ten week period of August 3, 2014 through October 11, 2014. While the employer did not have a person available for the fact-finding interview, the documents the employer submitted for the fact-finding interview, if unrefuted, were sufficient to establish misconduct. This was sufficient to establish participation within the meaning of the law. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The Cairns Deputy's August 22, 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 \$4480.00 in benefits for the ten week period of August 3, 2014 through October 11, 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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