

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

NICHOLAS D HANSON

Claimant

APPEAL NO. 18A-UI-04233-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS ENTERPRISES INC

Employer

OC: 02/25/18

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 March 27, 2018, 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 Benefits Bureau deputy's conclusion that the claimant's February 26, 2018 discharge was not based on a current act. After due notice was issued, a hearing was held on April 30, 2018. Claimant Nicholas Hanson participated. Andrea Rozell represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1, 2 and 3 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.

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: Nicholas Hanson was employed by Wells Enterprises, Inc. as a full-time maintenance supervisor until February 27, 2018, when Andrea Rozell, Human Resources Associate Business Partner, Courtney Wilson, Human Resources Business Partner, and Scott Kommes, Senior Manager, discharged him from the employment. Mr. Hanson began his employment in 2007. In 2012, Mr. Hanson was promoted to Maintenance Supervisor. Tom Nilles, Maintenance Manager, was Mr. Hanson's immediate supervisor. Mr. Hanson supervised 13 maintenance employees all of whom were men. The employer's plant employs a sizeable number of men and women.

The employer's decision to discharge Mr. Hanson from the employment was based on the employer learning that Mr. Hanson had used a PIG oil absorbent pad that resembled a large tampon as a "manpon" mock award that he issued to subordinates whom he believed whined too much or who otherwise performed deficient work. Mr. Hanson began using the "manpon" in the summer of 2017 after he observed that the object resembled a tampon. Mr. Hanson kept the object on display in his office and issued it to subordinates in front of other employees to purportedly motivate subordinates.

The employer learned about Mr. Hanson's use of the "manpon" on February 17, 2017, when Crew Lead Mark Wiltgen reported to Brad Galles, Plant Manager, that Mr. Hanson had that week handed him a homemade tampon in front of the maintenance crew. During that week, Weston Reller, a supervisor in training was shadowing Mr. Hanson. Mr. Reller had noted the "manpon" on display in Mr. Hanson's office and had asked what the object was. Mr. Hanson subsequently discarded the object. Once Mr. Wiltgen made his report to Mr. Galles, the employer's human resources personnel commenced an investigation by interviewing maintenance employees including Mr. Wiltgen, Mr. Reller and three other employees prior to interviewing Mr. Hanson. The employer learned that Mr. Hanson used the "manpon" to publicly humiliate subordinates. The employee interviews occurred from February 19 to February 23. At the time the employer interviewed Mr. Hanson on February 23, Mr. Hanson admitted to having possessed the object for six to eight months and having issued it to employees on two occasions. Mr. Hanson admitted that he had issued the object to Mr. Wiltgen. On February 23, the employer advised Mr. Hanson that the matter was serious and was contrary to the workplace relationship training. The employer advised Mr. Hanson that the conduct constituted harassment of team members and that it exposed the employer to risk.

In 2012, the employer had issued to Mr. Hanson the employer's Code of Conduct. The Code of Conduct included a section on respect that included a policy that prohibited harassment based on sex/gender and other legally protected classifications.

On February 27, 2018, the employer notified Mr. Hanson that he was discharged from the employment based on his use of the homemade tampon to humiliate maintenance techs.

Mr. Hanson established an original claim for unemployment insurance benefits that was deemed effective February 25, 2018 and an additional claim that was effective March 18, 2018. Mr. Hanson received \$3,096.00 in benefits for the six-week period of March 18, 2018 through April 28, 2018. Wells Enterprises is the primary base period employer.

On March 26, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Hanson's separation from the employer. Kristin Schlipman of ADP represented the employer at the fact-finding interview. Ms. Schlipman gave an oral statement that outlined the basis for the discharge, but got a number of the relevant dates incorrect. At the fact-finding interview Mr. Hanson asserted that the most recent incident involving the homemade tampon was in December 2017. Based on this misleading information from Mr. Hanson, the deputy concluded that the discharge was not based on a current act.

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

The evidence in the record establishes a discharge on February 27, 2018 that was based on a current act of misconduct. Mr. Hanson's repeated use of the homemade tampon over the course of several months to humiliate subordinates constituted harassment and abuse of subordinates that exposed the employer to liability for legally-prohibited harassment based on a protected classification, sex/gender. The essence of the insult communicated through handing out the homemade tampon was that woman in the workplace were inherently inferior to men and that recipient of the "manpon" was behaving like a woman. Mr. Hanson's conduct was an

intentional and gross violation of the employer's Code of Conduct that demonstrated a substantial disregard of the employer's interests. The employer learned of the conduct on February 17, 2018. The employer promptly and thoroughly investigated the matter. The employer discharged Mr. Hanson 10 days after learning of the conduct. There was not unreasonable delay between the employer's first knowledge of the conduct and the discharge.

Because the evidence in the record establishes that Mr. Hanson was discharged for a current act of misconduct in connection with the employment, Mr. Hanson 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. Hanson 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) and (b).

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. The overpayment amount is \$3,096.00 in benefits for the six-week period of March 18, 2018 through April 28, 2018. The evidence establishes that the employer participated in the fact-finding interview within the meaning of the law through the participation of the ADP representative. Even if the evidence had failed to establish employer participating, the evidence indicates that Mr. Hanson provided intentionally misleading information at the fact-finding interview when he asserted the most recent incident involving the homemade tampon had occurred in December 2017. Mr. Hanson is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The March 27, 2018, reference 01, decision is reversed. The claimant was discharged on February 27, 2018 for a current act of 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 ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$3,096.00 in benefits for the six-week period of March 18, 2018 through April 28, 2018. The claimant must repay the benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs