IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LUCAS W JORDAN
Claimant

AIRGAS USA LLC
Employer

APPEAL NO. 18A-UI-05207-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/25/18
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 April 23, 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 was discharged on March 30, 2018, for no disqualifying reason. After due notice was issued, a hearing was held on May 23, 2018. Claimant Lucas Jordan participated. Thomas Harland represented the employer and presented additional testimony through Wendy Stephens and Kelly Joyce. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 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 intentional misrepresentation 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 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: Lucas Jordan was employed by Airgas U.S.A., L.L.C. from 2013 until March 30, 2018, when the employer discharged him for theft and for threatening other employees. Mr. Jordan was a Shift Lead. Mr. Jordan's immediate supervisor was Wendy Stephens, Production Manager. Mr. Jordan was assigned to a shift that started at 6:00 a.m. and that ended at 6:00 p.m. At the

start of the shift on March 23, 2018, Mr. Jordan learned that the Monster Energy drink vending machine located in the workplace was unlocked. Mr. Jordan opened the machine and removed four cans of Monster Energy drink without paying for the beverages. At least two employees, Maintenance Tech Don Lick and Plant Operator Juan Martinez, observed the theft in progress and attempted to dissuade Mr. Jordan from stealing from the machine. Mr. Jordan was Mr. Martinez's supervisor. Mr. Jordan's theft from the vending machine was recorded by the employer's video surveillance system. After Mr. Jordan took the items from the machine without paying for them, he notified the vending company that its machine was open.

On March 26, 2018, Mr. Jordan's theft from the vending machine came to the attention of Production Manager Wendy Stephens. Mr. Lick had reported the matter to his supervisor, Paul Swafer, Maintenance Manager. Mr. Swafer reported the matter to Ms. Stephens. On March 26, Ms. Stephens reviewed the surveillance video showing the theft and then reported the incident to Thomas Harland, Plant Manager. Mr. Harland reviewed the video surveillance that showed the theft from the vending machine.

On March 29, 2018, Mr. Harland questioned Mr. Jordan regarding the theft incident. Mr. Jordan denied than anyone had taken anything from the vending machine while it was unlocked. When Mr. Harland told Mr. Jordan he had reviewed the video surveillance, Mr. Jordan asserted that he had taken two Monster drinks from the machine, but that he had paid for them. When Mr. Harland told Mr. Jordan that the video surveillance showed him taking four Monster drinks from the machine with no money in sight, Mr. Jordan again asserted he had paid for the drinks. Mr. Jordan subsequently separately threatened Mr. Lick and Mr. Martinez with bodily harm for sharing information with the employer regarding the theft. During the employer's investigation of the matter, Mr. Lick and Mr. Martinez each separately advised the employer that Mr. Jordan had threatened him. Another employee had been present at the time Mr. Jordan threatened Mr. Lick. The employer collected written statements from Mr. Martinez, Mr. Lick and the employee who witnessed Mr. Jordan threaten Mr. Lick.

On March 30, Mr. Harland determined it was necessary to remove Mr. Jordan from the workplace while he decided what to do next. While Mr. Harland was in the process of escorting Mr. Jordan from the plant, Mr. Jordan again threatened Mr. Lick. Mr. Harland was present when Mr. Jordan uttered the threat that he would catch up with Mr. Lick outside of work. Later that day, the employer notified Mr. Jordan that he was discharged from the employment.

Mr. Jordan established an original claim for unemployment insurance benefits that was effective March 25, 2018. Iowa Workforce Development (IWD) set Mr. Jordan's weekly benefit amount at $455.00. At the time Mr. Jordan established the claim, he had an outstanding overpayment of benefits. IWD approved $455.00 in benefits for each of the four weeks between April 1, 2018 and April 28, 2018, but held back those benefits and offset them against the prior overpayment. IWD approved $455.00 in benefits for the benefit week that ended May 5, 2018. IWD offset $295.00 of those weekly benefits against the prior overpayment and paid out the $160.00 balance of the weekly benefits. IWD approved $455.00 in benefits for the weeks that ended May 12, 19, and 26, 2018 and paid out those benefits. The total benefits approved in connection with the claim was $3,640.00 for the eight weeks between April 1, 2018 and May 26, 2018. Airgas U.S.A., L.L.C. is the sole base period employer.

On April 20, 2018, an IWD Benefits Bureau deputy held a fact-finding interview that address Mr. Jordan's separation from the employment. Mr. Jordan participated in the fact-finding interview and provided intentionally false and misleading statements to obtain a decision in his favor. Mr. Jordan's intentionally false and misleading statements included an assertion that he had paid for the Monster Energy drinks he had taken from the vending machine and included a

denial that he had threatened anyone in the workplace. The employer, through Corporate Cost Control, elected to participate in the fact-finding interview through documentation. The employer documents submitted for the fact-finding interview consisted of five employee statements of the particulars that led to Mr. Jordan being discharged from the employment. One of those statements was from the plant manager, who set forth in his statement the events that factored in the discharge decision. Another statement was form Ms. Stephens. The other three statements were from Mr. Martinez, Mr. Lick, and the employee who was present when Mr. Jordan threatened Mr. Lick.

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. *See Henecke v. Iowa Dept. Of Job Services*, 533 N.W.2d 573 (Iowa App. 1995).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience*. Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence establishes that Mr. Jordan provided intentionally false and misleading testimony at the appeal hearing. The employer testimony and the unsworn written statements were consistent and provided sufficient evidence to rebut Mr. Jordan's denials that he committed theft and denials that he threatened co-workers. The weight of the evidence in the record establishes that Mr. Jordan did indeed steal from the vending machine on March 23, 2018, when he removed four Monster drinks without paying for them. Two employees, Mr. Lick and Mr. Martinez, observed Mr. Jordan commit the theft from the vending machine. Two managers, Ms. Stephens and Mr. Harland, reviewed surveillance video that showed the removal of the items from the vending machine without any tendering of payment. The theft demonstrated an intentional and substantial disregard of the property rights of the vendor. The theft demonstrated an intentional and substantial disregard of the employer's interest in maintaining an honest, good faith relationship with the vendor, and the employer's interest in maintaining a workplace free of theft. The weight of the evidence establishes that Mr. Jordan threatened at least two co-workers, one being a subordinate, for sharing truthful information with the employer regarding the theft. Mr. Jordan's workplace threats demonstrated an intentional and substantial disregard of the employer's interest in maintaining a safe, harassment-free and violence-free work environment. The theft and each of the threats separately constituted misconduct in connection with the employment.

Because the evidence in the record establishes a discharge for misconduct in connection with the employment, Mr. Jordan 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. Jordan 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 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).

Iowa Administrative Code rule 817-24.10(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.

Mr. Jordan received benefits, but has been disqualified for benefits as a result of this decision. The $3,640.00 in unemployment insurance benefits that were paid to Mr. Jordan or otherwise credited to him for the eight weeks between April 1, 2018 and May 26, 2018, constitute an overpayment of benefits. The detailed documentation the employer provided for the fact-finding interview satisfied the participation requirement. Even if that material had not demonstrated participation, the evidence establishes that Mr. Jordan made intentionally false and misleading statements at the fact-finding interview to obtain a decision in his favor. Mr. Jordan must repay the $3,640.00 in unemployment insurance benefits that were paid or otherwise credited to him for the eight weeks between April 1, 2018 and May 26, 2018. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid or otherwise credited to Mr. Jordan.

DECISION:

The April 23, 2018, reference 01, decision is reversed. The claimant was discharged on March 30, 2018, for misconduct in connection with the employment. The claimant was overpaid $3,640.00 in unemployment insurance benefits for the eight weeks between April 1, 2018 and May 26, 2018. The claimant must repay the benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid or otherwise credited to the claimant.

_____
James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/scn