IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHARLES W WITTMUSS
Claimant

CHECK-N-GO OF IOWA INC
Employer

APPEAL NO: 06A-UI-08506-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/22/06 R: 02
Claimant: Appellant (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Charles W Wittmuss filed a timely appeal from the August 22, 2006, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on September 11, 2006. Mr. Wittmuss participated. District Director of Operations Randy Jondal represented the employer and presented additional testimony through Merle Hay Manager Janelle McMurray and employee Stephanie Peterson.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits. He was.

Whether the claimant's intention failure to disclose information regarding prior similar employment, from which he had been discharged for cash shortages, constituted substantial misconduct. It did.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Charles Wittmuss was employed by Check-N-Go as a Store Manager in training from June 29, 2006 until August 2, 2006, when District Director of Operations Randy Jondal discharged him. Mr. Jondal had hired Mr. Wittmuss to manage the store the employer intended to open in Ames. During the brief period of employment, Mr. Wittmuss was in training at the Merle Hay store. Janelle McMurray managed that store and supervised Mr. Wittmuss' training.

The incident that prompted the discharge came to the attention of the employer on August 2, 2006. On that date Ms. McMurray learned that Mr. Wittmuss had previously worked for competitor Check-into-Cash on a full-time basis for three years, had ultimately been the manager of the Ames store, had been discharged from that employment in connection with a significant cash shortage in June 2006, and had intentionally withheld information regarding the prior employment from Check-N-Go during the application and interviewing process. Mr. Wittmuss provided this information to Ms. McMurray when she specifically asked about the

prior employment. Customers who recognized Mr. Wittmuss from the prior employment had made comments and questioned why Check-N-Go had hired him after he had been discharged from the prior employment. At the same time Mr. Wittmuss acknowledged the prior employment, he requested that Ms. McMurray not further divulge the information. Implied in this request was a request that Ms. McMurray withhold this information from her superiors.

District Director of Operations Randy Jondal and Human Resources Representative Mark Little were scheduled to be at the Merle Hay store on August 2 and Ms. McMurray took the opportunity to share the newly acquired information with Mr. Jondal. Mr. Jondal questioned Mr. Wittmuss and Mr. Wittmuss acknowledged that he had intentionally withheld the information during the application and interviewing process because he thought it would negatively impact his application and his chance of being hired by Check-N-Go. Mr. Jondal discharged Mr. Wittmuss at the end of the meeting.

Mr. Wittmuss had completed a written application for employment at Check-N-Go. The application indicated on its face that it was a Check-N-Go document, rather than a generic application form. Immediately above the space provided for Mr. Wittmuss' signature was an applicant acknowledgement section for Mr. Wittmuss' review and signature. Included in the acknowledgement text was the following: "I understand falsification, misrepresentation, incomplete information, or omission of facts called for on this application will result in dismissal." The application had asked Mr. Wittmuss to list his prior employment. Mr. Wittmuss also submitted a resume, but omitted information regarding the prior employment.

Mr. Jondal had interviewed Mr. Wittmuss for the manager position. During the interview, Mr. Wittmuss demonstrated remarkable knowledge of the payday loan industry. Mr. Wittmuss represented to Mr. Jondal that he had gained his knowledge of the payday loan industry through research on the Internet and other research. Mr. Wittmuss represented that his general business knowledge was based on experience gained from assisting his father with a business venture.

In deciding to withhold information regarding his prior employment with Check-Into-Cash, Mr. Wittmuss considered his former employer's policy of not hiring applicants who had worked for and been discharged from another payday loan company. Mr. Wittmuss also considered that Check-No-Go would not view favorably an applicant who had been discharged based on a significant cash shortage.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Wittmuss was discharged for misconduct in connection with the employment. It does.

Iowa Code section 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.

871 IAC 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 Department of Job Service, 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).

The greater weight of the evidence indicates that Mr. Wittmuss' decision and conduct in withholding information regarding his prior employment was not a mere good faith exercise of discretion or simply poor judgment. Instead, the greater weight of the evidence indicates that Mr. Wittmuss essentially perpetrated a fraud on the employer to gain the employment. Regardless of whether Mr. Wittmuss read the acknowledgment portion of the application for employment, that text put Mr. Wittmuss on notice that the employer expected and required full and accurate disclosure of prior employment. That text also warned Mr. Wittmuss that failure to fully and accurately disclose information on the application would subject him to discharge if the omitted information subsequently came to the employer's attention. Mr. Wittmuss' testimony that he neglected to read the acknowledgment section of the application is contrary to the greater weight of the evidence, which indicates a well-considered and executed plan to withhold the information while simultaneously demonstrating industry expertise.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Wittmuss was discharged for misconduct. Accordingly, Mr. Wittmuss 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 employer's account shall not be charged for benefits paid to Mr. Wittmuss.

DECISION:

The Agency representatives August 22, 2006, reference 03, decision is affirmed. 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 employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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