

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SPENCER B SAGE

Claimant

APPEAL NO. 16A-UI-07193-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABRH LLC

Employer

OC: 05/29/16

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 June 20, 2016, 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 an agency conclusion that the claimant had been discharged on May 30, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on July 18, 2016. Claimant Spencer Sage did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Michele Hawkins of Equifax represented the employer and presented additional testimony through Nick Wilson and Patrick Greene. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibit One 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 is required to 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: Spencer Sage was employed by ABRH, L.L.C., d/b/a Village Inn, as a full-time cook from August 2015 until May 30, 2016, when Patrick Greene, General Manager, discharged him from the employment. Mr. Sage last performed work for the employer on the evening of May 29, 2016

and was scheduled to work until close. The restaurant was scheduled to close at midnight. Mr. Sage was the only cook working that evening. Mr. Sage walked off the job at about 10:55 p.m. Mr. Sage punched the computer screen on the cooks' line through which food orders were communicated to the kitchen. Mr. Sage turned off the kitchen lights. Mr. Sage clocked out as if he was going to break. Mr. Sage left without permission and without performing his closing duties. Server Nick Wilson was the supervisor on duty. Mr. Wilson observed during the shift that Mr. Sage was unhappy about working the shift. Shortly before 11:00 p.m., Mr. Wilson was helping a guest in the front of the restaurant when he heard a loud noise coming from the kitchen area. When Mr. Wilson finished assisting the guest, he went to the kitchen area. Mr. Wilson discovered that all the lights in the kitchen were turned off and that Mr. Sage was nowhere to be found. Mr. Wilson discovered the computer monitor had spider web cracks in it. Mr. Wilson immediately attempted to contact Patrick Greene, General Manager. Mr. Greene reviewed Mr. Wilson's message at 11:45 p.m. and immediately reported to the restaurant. Mr. Greene completed Mr. Sage's closing duties so the restaurant would be ready to reopen the next morning.

On the morning of May 30, 2016, Mr. Sage contacted Mr. Greene. During that contact, Mr. Sage asserted that the day cook must have broken the computer screen. Mr. Greene notified Mr. Sage that he was discharged from the employment.

Mr. Sage had also walked off the job a few weeks earlier in response to a female coworker rebuffing Mr. Sage's interest in a relationship with the female coworker.

Mr. Sage established a claim for unemployment insurance benefits that was deemed effective May 29, 2016 and received \$1,572.00 in benefits for the six-week period of May 29, 2016 through July 9, 2016. ARBH/Village Inn is one of Mr. Sage's base period employers. On June 17, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Sage's separation from the employment. Both parties had appropriate notice of the fact-finding interview. The employer's representative of record, Equifax, arranged for Mr. Greene to participate in the fact-finding interview. On June 16, 2016, an Equifax representative faxed a letter to Workforce Development that named Mr. Greene as the employer's representative for the fact-finding interview and that provided a telephone number where Mr. Greene could be reached for the fact-finding interview. Mr. Greene was standing by for the fact-finding interview, but did not receive a call from the claims deputy. The claim's deputy instead called a telephone number for Equifax, waited on hold for an extended time, and then terminated the call. In the June 16 letter, Equifax included a narrative of the final incident that triggered the discharge. At the time of the fact-finding interview, Mr. Sage provided an intentionally false statement in which he asserted that he had not broken the computer screen and in which he asserted that he had closed the kitchen as usual after cooking the final order and after completing his closing duties.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of

whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

The evidence in the record establishes two bases for concluding that Mr. Sage was discharged for misconduct in connection with the employment. The first basis is the intentional damage to the employer's equipment. The evidence in the record is sufficient to establish that Mr. Sage, and no one else, punched the computer monitor on the cooks line thereby damaging the monitor. That intentional destruction of the employer's property constituted misconduct in connection with the employment.

The evidence also establishes that Mr. Sage left work early without permission on May 29, 2016. While a disqualifying discharge for attendance usually requires *excessive unexcused* absences, a single unexcused absence may in some instances constitute misconduct in connection with the employment that would disqualify a claimant for benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). In Sallis, the Supreme Court of Iowa set forth factors to be considered in determining whether an employee's single unexcused absence would constitute disqualifying misconduct. The factors include the nature of the employee's work, dishonesty or falsification by the employee in regard to the unexcused absence, and whether the employee made any attempt to notify the employer of their absence. The particular circumstances of Mr. Sage's early departure on May 29 were sufficient to establish misconduct in connection with the employment based on that single absence. Mr. Sage was the only cook on duty. If Mr. Sage left, there was no other cook to fulfill orders. In other words, Mr. Sage's early departure substantially undermined the employer's ability to run its business and did so in the middle of a shift. There was no attempt on the part of Mr. Sage to notify the employer of his desire to leave work early. The destruction of the employer's equipment and the failure to complete closing duties were additional aggravating factors.

Even though the administrative law judge concludes that Mr. Sage's early departure from the final shift was sufficient to establish misconduct based on the single absence, the evidence establishes a similar unauthorized early departure a few weeks earlier. The two similar walk-offs were enough to establish excessive unexcused absences.

Mr. Sage's conduct demonstrated a willful and wanton disregard of the employer's interests. Because Mr. Sage was discharged for misconduct in connection with the employment, he 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 \$1,572.00 in benefits for the six-week period of May 29, 2016 through July 9, 2016. The written materials that the employer submitted for the fact-finding interview were sufficient, if un rebutted, to establish misconduct in connection with the employment. For that reason, the administrative law judge concludes that the employer did indeed participate in the fact-finding interview within the meaning of the law. The employer was denied an opportunity to provide a verbal statement at the fact-finding interview as the claims deputy failed to use the contact information for Mr. Greene that the employer had provided in the June 16, 2016 letter. The evidence further establishes that Mr. Sage provided intentionally misleading information at the time of the fact-finding interview. For all these reasons, Mr. Sage is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to Mr. Sage.

DECISION:

The June 20, 2016, reference 01, decision is reversed. The claimant was discharged on May 30, 2016 for 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 allowance. The claimant must meet all other eligibility requirements. The claimant was overpaid \$1,572.00 in benefits for the six-week period of May 29, 2016 through July 9, 2016. The claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs