IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL D LACKEY
Claimant

WADSWORTH OLD CHICAGO INC
Employer

APPEAL NO. 13A-UI-12093-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/22/13
Claimant: Respondent (2-R)

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 October 16, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 20, 2013. Claimant Michael Lackey participated. Tom Halpin of Equifax represented the employer and presented testimony through Michael Adams, Heather Lawson, and Chris Odendahl. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Five and Six 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.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Michael Lackey was employed by Wadsworth Old Chicago, Inc., d/b/a Old Chicago, as a full-time manager from 2006 until May 3, 2013, when Michael Adams, Regional Manager, discharged him from the employment. On April 13, 2013, Mr. Adams spoke to a bartender who had just quit his long-term employment. The bartender cited an incident involving Mr. Lackey as a factor in his decision to leave his employment. The bartender alleged that Mr. Lackey had refused to assist with a table that had been kept waiting for their meal order for an extended period. Mr. Lackey had indicated he was busy, had provided the bartender with his business card to give to the guests, and had later taken steps to address the situation. In speaking with the bartender about the matter, Mr. Lackey had used profanity. The conversation with the former bartender prompted Mr. Adams to speak with additional staff about Mr. Lackey's demeanor and language.

Mr. Adams spoke next with bartender and supervisor Heather Lawson and with Chris Odendahl, Assistant General Manager and Kitchen Manager. These two reported to Mr. Adams that a number of employees had come to them with concerns about Mr. Lackey's conduct and utterances in the workplace. They also reported that some female staff would inquire about what shifts Mr. Lackey was supervising and then would give away those shifts. Ms. Lawson had heard Mr. Lackey refer to staff as worthless, lazy and pathetic. Ms. Lawson told Mr. Adams about an incident on April 10, 2013, wherein Mr. Lackey had assisted at the restaurant with a "tour party" kickoff to promote particular beers. Though Ms. Lawson and Mr. Adams both assisted with the kickoff, under the employer's work rules they were considered off-duty at the time. During the kick party Mr. Lackey had consumed beer. Mr. Lackey had then assisted with expediting food in violation of the employer's work rules. Mr. Odendahl had been present for two incidents involving Mr. Lackey and found both to be disturbing. At a manager's meeting in early April, Mr. Lackey had opined in reference to the restaurant's non-management staff, "These people should fear for their fucking jobs." More recently, Mr. Odendahl had been working a shift with Mr. Lackey and had entered the back of the house just in time to hear Mr. Lackey announce in a loud voice, "All you people are fucking lazy." Mr. Odendahl had also been present on April 13, the day when the bartender, Mitch, had quit his employment in response to his interaction with Mr. Lackey.

Mr. Adams next spoke to a dishwasher, Dee. Dee alleged that Mr. Lackey had told her that she did not know her "fucking job" and that Mr. Lackey had made inappropriate sexual remarks inquiring whether Dee found certain vendors sexually attractive. Dee also alleged that Mr. Lackey referred to her as "cuckoo." Dee referred Mr. Adams to other employees who might have something to say about dealing with Mr. Lackey. Ray, a food server, alleged to Mr. Adams that he had overheard Mr. Lackey telling employees that they were lazy. Another server, Abbie, alleged to Mr. Adams that when she had made mistakes with her tables, Mr. Lackey had called her "fucking lazy." Abbie also alleged that Mr. Lackey would make fun of her short stature and that he had made her cry.

After speaking to the above persons, Mr. Adams consulted with the employer's human resources department. Mr. Adams confirmed that Mr. Lackey had signed his acknowledgement of the employer's employee handbook, including the policy that prohibited obscene and abusive language.

On May 3, Mr. Adams met with Mr. Lackey. When Mr. Adams questioned Mr. Lackey about his use of profanity in the restaurant, Mr. Lackey admitted he had used profanity in the restaurant. Mr. Lackey added that the restaurant had struggled and that the purpose of his demeanor and language was to ensure that employees were doing their jobs.

Mr. Lackey established a claim for benefits that was effective September 22, 2013 and received $3,816.00 in benefits for the period of September 21, 2013 through November 23, 2013.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification

for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984).

The evidence in the record is sufficient to establish misconduct in connection with the employment. The employer provided testimony from two people, Ms. Lawson and Mr. Odendahl, who provided credible testimony concerning conduct they personally witnessed. The evidence indicates that neither had an axe to grind with Mr. Lackey. Mr. Odendahl provided credible testimony concerning Mr. Lackey's habit of directing profane and abusive language at subordinates. Ms. Lawson provided similar credible testimony regarding offensive and demeaning language that Mr. Lackey directed at subordinates. The weight of the evidence indicates that the additional allegations reported to Mr. Adams during his investigation were also credible and part of a consistent pattern of contemptuous and demeaning behavior on the part of Mr. Lackey. Given Mr. Lackey's position, along with the need to thoroughly investigate the matter and confer with human resources staff, the administrative law judge concludes that the employer did not unreasonably delay in discharging Mr. Lackey from the employment.

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

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. Because this decision disqualifies Mr. Lackey for benefits, the $3,816.00 in benefits that Mr. Lackey received for the period of September 21, 2013 through November 23, 2013 constitutes an overpayment of benefits.

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 will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The Agency representative's October 16, 2013, reference 01, decision is reversed. The claimant was discharged for misconduct. 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, provided he meets all other eligibility requirements.

The matter of deciding whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is **remanded** to the Agency.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs