

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAMS, REGENOLD, L
Claimant

APPEAL NO. 12A-UI-07976-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JACOBSON STAFFING COMPANY LC
Employer

OC: 05/27/12
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 20, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 23, 2012 at 1:00 p.m. Mike Dubberke, Account Representative, represented the employer. Claimant Regenold Williams did not participate in the hearing. Mr. Williams provided a telephone number for the hearing. Mr. Williams answered his phone at the scheduled start of the hearing, but disconnected from the call while the administrative law judge was getting the employer. The administrative law judge made two attempts to get Mr. Williams back on the line for the hearing, but in both instances Mr. Williams' phone rang until it routed the administrative law judge into his voice mailbox. The administrative law judge left an appropriate message with the agency's toll-free number, but did not hear back from Mr. Williams as of the entry of this decision at 2:00 p.m. on July 23, 2012.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: the employer is a staffing agency. In 2008, employer placed Regenold Williams in a full-time, temp to hire position at Titan Tire Distribution. Employer subsequently made Mr. Williams' position permanent, though Mr. Williams continued to be an employee of Jacobson Staffing Company. Employment ended on May 25, 2012, when Mike Dubberke, Jacobson Staffing Company Account Manager, discharged him for falsifying his timecard. Josh Reese was Mr. Williams' supervisor. On May 21, Mr. Reese observed Mr. Williams leaving the distribution facility at 11:30 p.m. Mr. Williams' timecard later indicated a 1:30 a.m. clock out time. Based on the events of May 21, the employer had Mr. Reese observe Mr. Williams during the evening of May 22. Mr. Reese observed Mr. Williams leaving at around 11:40 p.m. In addition, surveillance video also showed Mr. Williams leaving at that time. The employer had assigned another employee to observe the time clock area. At 1:42 a.m., a friend and coworker of Mr. Williams was in the vicinity of the time clock and clocked Mr. Williams out.

On May 23, Mr. Dubberke interviewed Mr. Williams about conduct and Mr. Williams made a blanket denial that he was leaving early or that he was having someone else clock him out after he left. When Mr. Dubberke told Mr. Williams that the employer had surveillance video showing him leaving at 11:42 p.m. and not returning to the building, Mr. Williams made a nonspecific statement about leaving the building for lunch break and dropping a car off. Mr. Dubberke told Mr. Williams that the employer had spoken with the supervisor and multiple coworkers who had confirmed Mr. Williams did not reenter the building after he left at 11:42 p.m. The employer suspended Mr. Williams on May 23 and discharged him on May 25.

At the start of the employment, Mr. Williams had acknowledged in writing his receipt of the employer's handbook. The handbook contained a policy that prohibited falsifying work hours. In March 2010, Mr. Williams was reprimanded for falsifying his work time.

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).

The evidence in the record establishes that Mr. Williams was discharged for misconduct in connection with the employment. The misconduct involved leaving work early without permission and conspiring with a coworker to falsify Mr. Williams’ timecard information so that Mr. Williams could get paid for hours he did not work. The conduct happened two consecutive days at the end of the employment. The conduct followed a reprimand for similar dishonesty and fraud in 2010.

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

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant’s separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency’s initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's June 20, 2012, 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 employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs