

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORTNEY M WILSON
Claimant

APPEAL NO. 16A-UI-09010-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 11/29/15
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 August 9, 2016, reference 04, decision that allowed benefits to the claimant provided she 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 July 12, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on September 16, 2016. Claimant Cortney Wilson participated. Alice Smolsky of Equifax represented the employer and presented testimony through Kayla Harken. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One (including One, 1A and 1B) and Exhibit Two (included Two and 2A-2D) were received 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. The administrative law judge took official notice of the Iowa Department of Human Services Child Care Assistance brochure.

ISSUES:

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

Whether the claimant has been 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: Cortney Wilson was employed by Care Initiatives, d/b/a Ravenwood Specialty Care, as a Certified Nursing Assistant (CNA) from December 2015 until July 12, 2016, when Kayla Harken,

Executive Director, and Cheryl Dryer, Director of Nursing, discharged her from the employment. The employer discharged Ms. Wilson for forging Ms. Harken's signature on a form that Ms. Wilson then submitted to the Iowa Department of Human Services (DHS) as part of her application for child care assistance. The form was an Employer's Statement of Earnings. Ms. Wilson had to submit the Statement of Earnings to document her financial need and to document that she was working sufficient hours to qualify for the child care assistance. The child care assistance program required that Ms. Wilson work an average of 28 hours per week to qualify for the program. See Iowa Department of Human Services Child Care Assistance brochure. In April 2016, Ms. Wilson reduced her work hours from full-time to 3 days, 24 hours, per week. This was less than the number of hours Ms. Wilson needed to work to qualify for the state child care assistance. Ms. Wilson did not present the Employer's Statement of Earnings to the employer so that the employer could complete and sign the portion of the form that was supposed to be completed by the employer. Instead, Ms. Wilson filled out the entire form and then forged Ms. Harken's name on the form. When Ms. Wilson filled out the employer's portion of the form, she intentionally misrepresented that her weekly work hours were 32-40. Ms. Wilson then provided the form to DHS as a purported bonafide Employer's Statement of Earnings. Ms. Harken learned of the forgery on July 7, 2016 when a DHS caseworker contacted Ms. Harken to verify the information provided on the Statement of Earnings form. Had Ms. Wilson actually submitted the form to the employer for completion by the employer, the employer would have made a copy of the form and kept that copy in Ms. Wilson's personnel file. Because Ms. Wilson did not provide the form to the employer, the employer had no such form on record for Ms. Wilson. When DHS provided a copy of the form for Ms. Harken's review Ms. Harken readily discerned that someone else had signed her name to the form. No one from Ravenwood had completed or signed the form.

Ms. Wilson established an original claim for unemployment insurance benefits that was effective November 29, 2015. In connection with her separation from the employment at Care Initiatives, Ms. Wilson established an additional claim for benefits that was effective July 10, 2016. In connection with the additional claim, Ms. Wilson has received \$1,416.00 in benefits for the eight-week period of July 10, 2016 through September 3, 2016. Ms. Wilson's base period for purposes of the claim year that began on November 29, 2015 consists of the third and fourth quarter of 2014 and the first and second quarter of 2015. Care Initiatives is not a base period employer for purposes of the claim year that began on November 29, 2015 and has not been charged for benefits paid to Ms. Wilson in connection with that claim year.

On August 5, 2016, a Workforce Development claims deputy held a fact-finding interview to address Ms. Wilson's separation from the Care Initiatives employment. Ms. Wilson participated in the fact-finding interview. At the fact-finding interview, Ms. Wilson told the claims deputy that she had denied forging Ms. Harken's signature at the time Ms. Harken contacted her on July 12, 2016. At the fact-finding interview, Ms. Wilson told the claims deputy that she had signed her own signature before giving the form to Ms. Harken on June 16, 2016 and that she received the form back from the employer on June 23, 2016 in a sealed envelope. Ms. Wilson told the claims deputy that she then took the sealed envelope to DHS. Significant portions of Ms. Wilson's statement to the claims deputy were intentional fabrications. Ms. Wilson had not delivered the form to the employer and had not received it back from the employer in a sealed envelope. Ms. Wilson intentionally misled the claims deputy with those statements. Phyllis Farrell of Equifax represented the employer at the fact-finding interview. Ms. Farrell provided an oral statement concerning the particulars concerning the conduct on the part of Mr. Wilson that prompted the employer to discharge Ms. Wilson from the employment. The employer's representative also provided documentation for the fact-finding interview. That documentation consisted of a corrective action statement, the forged Employer's Statement of Earnings, and a Request for Verification of employment that Ms. Harken completed on July 18, 2016. The

employer had also submitted a written protest that included a short narrative regarding the basis for the discharge.

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).

The weight of the evidence in the record establishes that Ms. Wilson did indeed forge Ms. Harken's signature on the Employer's Statement of Earnings. Ms. Wilson also intentionally misrepresented her work hours on the form. Ms. Wilson forged the employer's information because she knew she did not qualify for the child care assistance after electing to reduce her work hours to part-time. A reasonable person would expect Ms. Harken to recognize her own signature, as well as to recognize when her signature was not penned by her. The employer would have no reason to misstate Ms. Wilson's weekly work hours as full-time in June when Ms. Wilson had been working part-time since April. On the other hand, Ms. Wilson knew she needed to meet a 28 weekly work-hours threshold to qualify for the child care assistance and that she was working too few hours to qualify. While Ms. Wilson's forgery did not involve an employer record or form, Ms. Wilson forgery occurred *in connection with the employment*. Ms. Wilson created the nexus by forging the employer's signature on a government form that she then submitted to the government as information purportedly provided by the employer. Ms. Wilson's dishonest conduct and the forgery itself demonstrated a willful and wanton disregard of the employer's interests. Ms. Wilson's role in caring for dependent adults required that the employer be able to trust her. Given the level of dishonest conduct involved in the forged form, a reasonable employer would conclude it could not trust Ms. Wilson in connection with other work-related matters.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wilson was discharged for misconduct in connection with the employment. Accordingly, Ms. Wilson is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Wilson 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 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 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, -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.

Ms. Wilson received benefits, but has been denied benefits as a result of this decision. Accordingly, she has been overpaid \$1,416.00 in benefits for the seven-week period of July 10, 2016 through September 3, 2016. The employer is not a base period employer. Accordingly, the employer has not been charged for the benefits paid to Ms. Wilson in connection with the claim and was not at risk of being charged for benefits paid to her during the current benefit year. Because the discharge was for misconduct in connection with the employment, Care Initiatives is relieved of liability for future benefits that might be paid to the claimant. The employer satisfied the fact-finding interview participation requirement through the combination of the oral statement of the third-party representative and the documentation concerning the misconduct that prompted the discharge. The employer's contribution to the fact-finding interview was sufficient, if unrebutted, to establish disqualifying misconduct in connection with the employment. The weight of the evidence indicates that Ms. Wilson intentionally misled the claims deputy at the time of the fact-finding interview. Ms. Wilson must repay the \$1,416.00 in benefits that she received for the eight-week period of July 10, 2016 through September 3, 2016.

DECISION:

The August 9, 2016, reference 04, decision is reversed. The claimant was discharged on July 12, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance. The claimant must meet all other eligibility requirements. The employer's account is relieved of liability for benefits, including liability for benefits already paid to the claimant. The claimant is overpaid \$1,416.00 in benefits for the eight-week period of July 10, 2016 through September 3, 2016. The claimant must repay those benefits.

This matter is remanded for determination of whether Ms. Wilson has been able to work and available for work within the meaning of the law since July 10, 2016.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs