

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

68-0157 (9-06) - 3091078 - EI	
DONALD L GORNICK Claimant	APPEAL NO. 18A-UI-11581-JTT
CASEY'S MARKETING COMPANY Employer	ADMINISTRATIVE LAW JUDGE DECISION
	OC: 10/28/18 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 November 19, 2018, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on November 1, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on December 20, 2018. Claimant Donald Gornick participated personally and was represented by attorney Jim Duff. LeAnne Krell represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Department Exhibits D-6, D-9, D-10, D-11, and D-13 into evidence. The administrative law judge took official notice of the entire packet of 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 must repay overpaid 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: Donald Gornick was employed by Casey's Marketing Company as the full-time Office Manager at the employer's Ankeny Distribution Center until November 1, 2018, when the employer discharged him from the employment. Mr. Gornick began his employment with Casey's in 1987 and was promoted to the Office Manager position in 2015. Bill Brauer, Distribution Center Manager, was Mr. Gornick's immediate supervisor. Mr. Gornick supervised 12 office employees and oversaw all aspects of clerical work related to receipt of merchandise, shipment of merchandise, processing returns, auditing inventory, and paying invoices. On October 31, 2018, the employer learned that Mr. Gornick and a small number of other Distribution Center staff had conspired over an extended period to convert warehouse merchandise to personal use. LeAnne Krell,

Assistant General Counsel, conducted an investigation of the matter that included review of surveillance video that documented Mr. Gornick's participation in removing merchandise from the warehouse, converting that merchandise to his own personal use, and distributing the merchandise to other employees for their personal use. Ms. Krell's investigation also included interviewing 26 employees. As Office Manager, Mr. Gornick was charged with maintaining the "returns" area of the warehouse. Mr. Gornick took advantage of his oversight of the returns area to convert merchandise from that area to unauthorized personal use. Mr. Gornick's participation in the ongoing scheme was in violation of the Casey's Code of Conduct and in violation of Casey's Honesty and Integrity policy. Mr. Gornick was well familiar with both policies and, as Office Manager, was charged with enforcing the policies. When Ms. Krell interviewed Mr. Gornick on November 1 as part of the employer's investigation of the matter, Mr. Gornick initially adamantly denied knowledge or involvement in the scheme. Only after Ms. Krell stated that she had surveillance video documenting Mr. Gornick's involvement did Mr. Gornick concede his involvement. This intentional dishonesty in the context of the investigative interview also violated the Code of Conduct and Honesty and Integrity policy.

Mr. Gornick established an original claim for unemployment insurance benefits that Iowa Workforce Development deemed effective October 28, 2018. Mr. Gornick received \$2,425.00 in benefits for the period of November 18, 2018 through December 22, 2018. Casey's is the sole base period employer in connection with the claim.

On November 16, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Gornick's separation from Casey's. Zontael McCann of ADP/Equifax represented Casey's at the fact-finding interview. Ms. McCann provided a verbal statement and submitted documentation that included the Honesty and Integrity policy, Mr. Gornick's acknowledgement of receipt of the Code of Conduct and the employee handbook, and the Corrective Action Statement that outlined the basis for the discharge. Mr. Gornick provided a verbal statement at the fact-finding interview that included intentionally misleading statements. The intentionally misleading statements included assertions that Mr. Gornick had permission to convert the merchandise to personal use, that the employer did not carry the product in the employer's stores, and that Mr. Gornick was not hiding anything.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. Mr. Gornick's assertions that the self-dealing scheme was authorized by his superiors and that his violation of the Code of Conduct and Honesty and Integrity policy were unintentional are not credible assertions. No reasonable person in Mr. Gornick's position and circumstances could have concluded that the Casey's company was okay with employees removing merchandise from the Casey's warehouse on an ongoing basis and converting that merchandise to personal use. Nor could any reasonable person in Mr. Gornick's circumstances have concluded that such conduct would be in the employer's interests. Mr. Gornick took

advantage of his position to become a full participant in an ongoing scheme to remove property that he knew did not belong to him and to convert that property to personal use. That conduct constituted theft from Casey's. To make matters worse, Mr. Gornick was intentionally dishonest with the employer when initially questioned about the conduct. Mr. Gornick's conduct demonstrated a willful and wanton disregard of the employer's interests. Mr. Gornick is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Gornick 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) and (b).

Mr. Gornick received \$2,425.00 in benefits for the period of November 18, 2018 through December 22, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Gornick received constitute an overpayment of benefits. The verbal statement and documents the employer's representative provided for the fact-finding interview were together sufficient to satisfy the participation requirement. Even if the administrative law judge had concluded otherwise, the evidence establishes that Mr. Gornick made intentionally misleading statements at the fact-finding interview. For these reasons, Mr. Gornick is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Gornick.

DECISION:

The November 19, 2018, reference 01, decision is reversed. The claimant was discharged on November 1, 2018 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,425.00 in benefits for the period of November 18, 2018 through December 22, 2018. The claimant must repay the overpaid benefits. The employer's account shall 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/rvs