

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANNY L THORN**  
Claimant

**APPEAL NO: 19A-UI-00228-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACCURA HEALTHCARE OF CARROLL LLC**  
Employer

**OC: 12/02/18**

**Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Accura Healthcare of Carroll, LLC filed a timely appeal from a representative's unemployment insurance decision dated January 8, 2019, (reference 02) which held claimant eligible to receive unemployment insurance benefits, finding that the claimant's dismissal on December 7, 2018 was not a current act of misconduct. After due notice was provided, a telephone hearing was held on January 25, 2019. Claimant participated. Employer participated by Ms. Taesa Bailey, Administrator, Mr. Randy Kruse, Maintenance Supervisor and Micaela Markway, Business Manager.

**ISSUES:**

The first issue is whether the claimant was discharged for a current act of work-related misconduct sufficient to warrant the denial of unemployment insurance benefits.

The second issue is whether the claimant has been overpaid unemployment benefits.

The third issue is if there has been an overpayment, does the claimant have to repay the agency, or is the employer chargeable based upon the employer's participation in the fact-finding interview.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Danny Thorn was employed by Accura Healthcare of Carroll, LLC from January 31, 2017 when new owners took over the business until December 6, 2018 when he was discharged from employment. Mr. Thorn was employed as full-time maintenance assistant/housekeeping worker and was paid by the hour. His immediate supervisor was Randy Kruse.

In August 2018, Mr. Thorn was arrested for domestic abuse. Employer was aware of the claimant's arrest at that time. Ms. Bailey, the facilities administrator met with Mr. Thorn in August 2018 and questioned him about his arrest. Mr. Thorn maintained that the arrest was unjustified and his belief that the charges against him would be dismissed or would be allowed to enter a diversion program by the court. Ms. Bailey, Company Administrator, specifically

instructed Mr. Thorn at that time that he must inform her if he were to be convicted of the charges. Ms. Bailey explained that a conviction would require information to be sent to DHS, and DHS would then determine whether to approve Mr. Thorn to resume his employment at the care facility. Ms. Bailey referenced that it was the same procedure that Mr. Thorn had been required to follow at the time he was hired and he had a previous conviction. Mr. Thorn assured Ms. Bailey that he would notify her if a conviction took place. Thereafter, from time to time, Ms. Bailey questioned Mr. Thorn about the status of the charges against him, and on each occasion Mr. Thorn told Ms. Bailey that the sentencing was being “deferred.”

Mr. Thorn pled guilty to the domestic abuse charges against him in September 2018 and was sentenced to four days in jail in addition to time served. Mr. Thorn elected to serve out the remaining jail time on weekends that he had not been scheduled to work.

Mr. Thorn did not inform Ms. Bailey that he had pled guilty to the charges, and continued working. At Ms. Bailey’s request, the claimant was questioned by Mr. Kruse about whether he had been convicted of domestic abuse charges. Mr. Thorn agreed that he had pled guilty in September 2018. Mr. Thorn believed that his immediate supervisor was aware of his conviction because Mr. Thorn had spoken of jail time to his supervisor and because he had shown Mr. Kruse a cell phone depiction showing a prisoner that Mr. Thorn was incarcerated with who was a news item. Mr. Thorn also believed that his supervisor was aware that he had been convicted because his supervisor had arranged to have another worker fill in for Mr. Thorn during a weekend snow storm that happened when Mr. Thorn was on call, but serving his final day of incarceration.

A discharge meeting was held on December 6, 2018. During the meeting, Ms. Bailey referenced the specific instructions that she had given to Mr. Thorn to notify her of any convictions, and noted that Mr. Thorn had been convicted but had not notified her of that fact as instructed. Mr. Thorn did not disagree with any of Ms. Bailey’s statements and agreed that he had been told to inform Ms. Bailey if convicted and he had not done so. Mr. Thorn had chosen not to notify the administrator of his conviction because he believed he would be discharged from employment as he might no longer meet DHS requirements.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the claimant’s job separation took place because of work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits. It did.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee.

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 the case at hand, the employer became aware that Mr. Thorn had been arrested for domestic abuse in August 2018. The facilities administrator's met with Mr. Thorn at that time and questioned him about the circumstances of his arrest and whether he had been convicted. When Mr. Thorn indicated he had not been convicted, he was specifically instructed by Ms. Bailey to inform her if he were to be convicted and Ms. Bailey explained the necessity of Mr. Thorn doing so because he would be no longer qualified to work unless DHS reapproved him to work in a facility after an additional conviction. Mr. Thorn understood the instructions given to him by Ms. Bailey and was familiar with the process because he had undergone it earlier when he was hired by the company as a previous conviction had to be approved by DHS before he could be in employment with Accura Healthcare of Carroll, LLC.

The employer was not informed of Mr. Thorn's conviction when it took place in the month of September 2018 until December 6, 2018. After being informed of Mr. Thorn's arrest in August 2018, Ms. Bailey followed a reasonable course of action by specifically telling Mr. Thorn that he must inform Ms. Bailey if convicted, and by making timely inquiries asking Mr. Thorn if a conviction had taken place. Although Mr. Thorn knew that he had pled guilty and had been sentenced to four days additional incarceration, he provided untruthful statements to his employer repeatedly indicating that no conviction had taken place and any sentencing was being "deferred".

In addition to not following Ms. Bailey's specific directive to inform her, Mr. Thorn did not directly inform his supervisor that he had been convicted, instead he talked about jail time and made references to incarceration. Mr. Thorn asserts that he believed that doing this was the same as telling his supervisor that he had been convicted. The administrative law judge does not agree.

In this case, Mr. Thorn's references to his incarceration made to his supervisor were not sufficient. Mr. Thorn had been directly and specifically instructed by Ms. Bailey to report back to her whether he had been convicted of domestic abuse. Ms. Bailey had explained at length the important reasons that required Mr. Thorn to make this information available to her. The administrative law judge concludes, based upon the evidence in the record, that Mr. Thorn made a cognizant decision not to inform Ms. Bailey of his conviction and did not follow this reasonable and work-related instruction because he feared he would be discharged from employment. Mr. Thorn provided false and misleading information to the facility administrator during the months between his August 2018 arrest and his discharge on December 6, 2018. The employer acted promptly to discharge Mr. Thorn as soon as Ms. Bailey learned of his conviction. For these reasons, the administrative law judge concludes that the claimant's discharge was for a current act of work-connected misconduct. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment benefits in the amount of \$2,335.00 since filing a claim with an effective date of December 2, 2018 for the benefit weeks ending December 22, 2018 through January 26, 2019. The administrative record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

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. 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 section 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 benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer's account will not be charged for benefits paid.

**DECISION:**

The representative's unemployment insurance decision dated January 8, 2019, reference 02 is reversed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,335.00 and is liable to repay this amount to the agency. The employer's account shall not be charged based upon the employer's participation in the fact-finding interview.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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