

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAY D GOTTSCHALK
Claimant

APPEAL NO. 16A-UI-10756-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THEISENS INC
Employer

OC: 09/04/16
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 September 28, 2016, 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 an agency conclusion that the claimant was discharged on August 23, 2016 for no disqualifying reason. After due notice was issued, a hearing was held on November 1, 2016. Claimant Jay Gottschalk participated personally and was represented by attorney Emilie Roth Richardson. Jim Lincoln represented the employer and presented additional testimony through Heidi Bergfeld. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through 10 into evidence. The administrative law judge took official notice of the materials submitted for and generated in connection the fact-finding interview and marked the fact-finding worksheet for misconduct as Department Exhibit D-1.

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 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: Jay Gottschalk was employed by Theisens, Inc. as a full-time sporting goods associate from 2011 until August 23, 2016, when Jim Lincoln, Store Manager, discharged him from the employment. Mr. Gottschalk's immediate supervisor was Assistant Manager Betty Byers. Mr. Gottschalk's duties included making a daily count of the handguns the employer had on hand and documenting the gun count in a daily inventory log. The employer required a handgun inventory

count at the start of the business day and at the end of the business day. The employee who conducted the hand gun inventory was required to count all of the guns in the sporting goods display case and the additional guns secured in the gun safe and other locked containers located in the sporting goods stock room. Handguns that were part of the Ducks Unlimited program or the Pheasants Forever program were to be kept in the locked containers in the backroom, separate from the regular handgun inventory located in the handgun safe. Mr. Gottschalk was well familiar with the appropriate steps involved in taking the handgun inventory and documenting the handgun inventory. Mr. Gottschalk's duties also included processing newly received guns into the employer's inventory and inventory records, as well as facilitating and documenting transfers of guns from the employer's Dubuque store to other Theisens stores.

The final incidents that triggered the discharge played out over the course of August 18 through 21, 2016.

The primary concern that triggered the discharge involved Mr. Gottschalk's miscount of the number of handguns in inventory. On August 18, 2016, Mr. Gottschalk completed the morning handgun inventory and correctly documented 178 hand guns on hand. During his shift that day, Mr. Gottschalk received three new handguns and processed those into inventory. The three handguns were Ducks Unlimited guns. However, Mr. Gottschalk erroneously placed those three handguns in the gun safe, rather than in the separate Ducks Unlimited secured container. Later in day, Mr. Gottschalk or another employee moved the three handguns to the Ducks Unlimited container. At the end of the business day on August 18, another employee, Cody Stocks, took the evening handgun inventory and erroneously documented the inventory count as 178. In light of the three new handguns that had just been received, and in light of the three handguns still in stock pending transfer to another store, the correct handgun inventory was at that point 181.

On the morning of August 19, 2016, Mr. Gottschalk made an erroneous count of the number of hand guns on hand and documented 178 guns in inventory. The correct handgun count was still 181. Later that day, Mr. Gottschalk processed handgun transfers from the Dubuque store to another Theisens store. Mr. Gottschalk completed the appropriate transfer paperwork, but forgot to scan the transfer transactions into the employer's computer system. Without Mr. Gottschalk scanning the items into the computer system to initiate the electronic aspect of the transfer transaction, the receiving store was unable to scan the handguns into the computer system to complete the electronic aspect of the transfer. The receiving store brought the matter to Mr. Lincoln's attention. On the evening of August 19, another employee, Nick Accola, took the handgun inventory and erroneously concluded there were 175 handguns on hand.

On the morning of August 20, Mr. Gottschalk took the handgun inventory and erroneously concluded there were 175 handguns on hand. The handgun counting error continued through the evening of August 20, when another employee, Nick Accola, again erroneously concluded there were 175 handguns in stock.

Mr. Gottschalk did not count all of the handguns on hand when he made his counts on the mornings of August 19 and 20. The weight of the evidence indicates that Mr. Gottschalk and his coworkers had not counted the three new Ducks Unlimited handguns in the Ducks Unlimited storage unit from the evening of August 18 through the morning of August 21. When

Mr. Gottschalk made his count on the morning of August 19 and 20, he compared his count with the count from the previous shift. If his initial count matched the count from the previous shift, he checked no further to see whether the count was accurate. The employer discourages the sporting goods associates from relying on the handgun count from a prior shift when making their own independent morning or evening count of the handguns.

When Mr. Gottschalk did his morning count of the handguns on August 21, his count did not match Mr. Accola's count from the previous evening because a handgun in the gun safe had fallen behind the others. Mr. Gottschalk recounted, but got the same number. Mr. Gottschalk alerted Mr. Lincoln to the problem with the handgun count. Ms. Byers then counted the inventory. Rather than being one gun off the count, as Mr. Gottschalk had believed, the count was off by four guns. These included the gun that had fallen behind others in the gun safe and the three new Ducks Unlimited guns that had not been included in the count since the evening of August 18.

When Mr. Lincoln learned that the handgun count had not been properly taken since the evening of August 18, he reprimanded all three employees involved. In light of past reprimands issued to Mr. Gottschalk, Mr. Lincoln discharged Mr. Gottschalk from the employment on August 23. On October 16, 2015, Mr. Gottschalk had left the gun cabinet keys accessible and had left the gun case unlocked while he stepped away to assist a customer. On February 22, 2016, Mr. Gottschalk again left the gun cabinet keys accessible and left the gun case unlocked. On March 31, 2016, Mr. Gottschalk counted an empty box in the gun safe as a handgun on hand to arrive at an erroneous inventory count. Another employee had erroneously left the empty box in the handgun safe.

Mr. Gottschalk established a claim for benefits that was effective September 4, 2016. Mr. Gottschalk has received \$2,149.00 in benefits for the seven weeks between September 11, 2016 and October 29, 2016. Theisens is Mr. Gottschalk's sole base period employer.

On September 27, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. Gottschalk's separation from the employment. Heidi Bergfeld, Human Resources Administrator, represented the employer at the fact-finding interview. Ms. Bergfeld submitted documentation for the fact-finding interview that included copies of the same materials that were marked Exhibits Two through 10 at the appeal hearing, including a written statement from Mr. Lincoln.

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 establishes a pattern of carelessness and/or negligence indicating a willful disregard of the employer's interests. The weight of the evidence does not support Mr. Gottschalk's assertion that he consistently performed the handgun count in a fastidious, methodical manner. The weight of the evidence establishes that he failed to count all of the handguns in inventory on the morning of August 19 and 20. The evidence establishes that on August 19, Mr. Gottschalk failed complete all necessary steps in connection with the transfer of handguns to another store. The evidence establishes prior instances of carelessness and/or

negligence. On March 31, 2016, Mr. Gottschalk counted an empty box in the gun safe as a gun in stock. While another employee erred in leaving the box in the gun safe, the fact that the box was empty would have been readily discernible if Mr. Gottschalk's counting method was as fastidious and methodical as he asserts. The evidence establishes much more serious carelessness and/or negligence in October 2015 and in February 2016, when Mr. Gottschalk left the gun case and the key to the gun case accessible to unauthorized persons.

Based on the pattern of carelessness and/or negligence, the administrative law judge concludes that Mr. Gottschalk was discharged for misconduct in connection with the employment. Accordingly, Mr. Gottschalk is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Gottschalk 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 employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,149.00 in benefits for the seven weeks between September 11, 2016 and October 29, 2016, but has been denied benefits as a result of this decision. The benefits the claimant received constitutes an overpayment of benefits.

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. Bergfeld's participation in the fact-finding interview and the documentation the employer provided for the fact-finding interview, met that participation requirement set forth in the statute and the administrative rule. Accordingly, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The September 28, 2016, reference 01, decision is reversed. The claimant was discharged 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 ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$2,149.00 in benefits for the seven weeks between September 11, 2016 and October 29, 2016. The claimant must repay the benefits. The employer's account is relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs