

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ERIKA TOYNE
Claimant

APPEAL NO. 14A-UI-00843-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLSTEEL INC
Employer

OC: 12/22/13
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 January 16, 2014, reference 01, decision that allowed benefits to the claimant provided the claimant was otherwise eligible and that held the employer's account could be charged for benefits. After due notice was issued, a hearing was held on February 13, 2014. Claimant Erika Toyne participated. Ken Kjer of Employer's Edge represented the employer and presented testimony through Sarah Stapp and Scott Erickson. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One, Four, and Seven through 11, into evidence. The administrative law judge took official notice of the documents submitted for and generated in connection with the January 14, 2014 fact finding, but did so only for the purpose of determining whether the employer participated in 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 has been overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits already paid to the claimant or benefits to be paid to the claimant in the future.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Erika Toyne was employed by Allsteel, Inc., as a full-time work cell operator from 2010 until December 20, 2013, when the employer discharged her for violating the employer's Fairness & Respect policy. The conduct that violated the policy and triggered the discharge was Ms. Toyne and a coworker engaging in a pattern of grabbing each other's breasts on the production floor. The conduct started in July or August 2013 and continued until the first week of December

2013. Ms. Toyne and the coworker would engage in the mutual groping two or three times per week. The conduct came to the employer's attention on December 16, 2013, when a coworker complained about the conduct of other employee involved, Chelsea Whitacre. During the course of investigating the complaint, the employer interviewed multiple employees and learned that Ms. Whitacre and Ms. Toyne were in the habit of grabbing each other's breast as a form of horseplay. The employer interviewed Ms. Toyne on December 17, 2013, at which time Ms. Toyne admitted to the conduct. The conduct took place in the work area in the vicinity of other employees. Ms. Toyne had attended training regarding the employer's Fairness & Respect policy, which called for employees treating each other with fairness and respect. Ms. Toyne had also received a copy of the employee handbook.

Ms. Toyne had no prior reprimands.

Ms. Toyne established a claim for benefits that was effective December 22, 2013 and, so far, has received \$3,282.00 in benefits for the period of December 22, 2013 through February 15, 2014.

The employer's participation in the fact-finding interview that led to the January 16, 2014, reference 01, decision that allowed benefits was limited to the submission of documents. The employer did not make anyone available by telephone so that they could be reached for rebuttal testimony, if needed. The employer provided an investigative report for the fact-finding on which the employer had expunged witness names. The employer's documentation did not provide specific dates on which the employer alleged the claimant had engaged in the conduct that led to discharge. The employer provided a copy of the Fairness & Respect policy that contained general statements about acceptable conduct without addressing the specific conduct for which the claimant was discharged. The employer provided a handbook acknowledgment form without providing any portion of the handbook to which it applied. There is no indication that the claimant provided untruthful statements at the time of the fact-finding interview.

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).

The conduct in question constituted a current act because it only came to the employer's attention on December 16, 2013 and Ms. Toyne was discharged four days later. There is no way that Ms. Toyne could have engaged in the pattern of mutual groping on the production floor without knowing that the conduct was wholly inappropriate for the workplace. Others in the workplace, included several female coworkers, were subjected to having to observe the conduct and found it offensive. The conduct involved a willful and wanton disregard of the employer's interest in maintaining a civil, orderly work environment free of horseplay and offensive conduct.

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

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 § 96.3-7-a, -b.

The employer did not participate in the fact-finding interview within the meaning of the law because the employer's documentation, with expunged names and the absence of dates and details of the offending conduct, was insufficient to establish misconduct in connection with the employment. See 871 IAC 24.10(1).

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, the \$3,282.00 in benefits for the period of December 22, 2013 through February 15, 2014 constitutes an overpayment of benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview within the meaning of the law, the claimant is not required to repay the overpaid benefits and the employer remains subject to charge for the overpaid benefits.

Because the claimant was discharged for misconduct in connection with the employment, the employer's account will not be charged for benefits paid to the claimant for the period beginning February 16, 2014.

DECISION:

The Agency representative's January 16, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid \$3,282.00 in benefits for the period of December 22, 2013 through February 15, 2014. Because the employer did not participate in the fact-finding interview within the meaning of the law, the claimant will not be required to repay the overpaid benefits. The employer's account may be charged for the overpaid benefits. The employer's account will not be charged for benefits paid to the claimant for the period beginning February 16, 2014.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs