

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID L MCNEELEY**  
Claimant

**APPEAL NO. 16A-UI-09839-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MARSDEN BLDG MAINTENANCE LLC**  
Employer

**OC: 07/31/16**  
**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 August 30, 2016, reference 02, 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 had been discharged on August 3, 2016 for no disqualifying reason. After due notice was issued, a hearing was started on September 26, 2016 and concluded on October 7, 2016. The two-day hearing was made necessary by Mr. McNeeley appearing 44 minutes late for the hearing on September 26, 2016. Mr. McNeeley participated briefly in the proceeding on September 26, 2016 and participated fully on October 7, 2016. On both dates, David Moehle of ADP represented the employer and presented testimony through Margarita Bernardino and Julian Garcia. Spanish-English interpreters Martin Corea and Lilly Richardson assisted with the hearing. The administrative law judge took official notice of the agency's record of benefits disbursed to the claimant and received Exhibits One through Six 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.

**ISSUE:**

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: David McNeeley was employed by Marsden Building Maintenance, L.L.C. as a part-time General Cleaner from February 2019 until August 3, 2016, when the employer discharged him for theft of time and false timekeeping. Mr. McNeeley's immediate supervisor was Area Supervisor Julian Garcia. Mr. McNeeley's work duties involved cleaning at several business locations. Those locations included three banks and a police academy. Mr. McNeeley worked alone. Mr. McNeeley was to complete his cleaning duties at one location and then move on to the next until his cleaning duties and work shift were done. Mr. McNeeley was required use the client's telephone to notify the employer of his arrival at a jobsite and to use the client's phone to notify the employer when he was done cleaning and departing from the job site. Under the employer's break policy, Mr. McNeeley was not authorized to take a meal break or anything other than a brief restroom and water break unless he worked eight hours during a shift. Mr. McNeeley had received the employee handbook and the break policy at the start of his employment.

The conduct that triggered the discharge occurred on July 26, 2016. On that day, Mr. McNeeley was supposed to start his work date at 6:00 p.m. Mr. McNeeley arrived late to his first jobsite at 6:16 p.m. Prior to that date, the employer suspected that Mr. McNeeley had been taking unauthorized breaks from his work schedule. Due to that concern, Mr. Garcia tracked Mr. McNeeley's whereabouts on July 26 as Mr. McNeeley moved from one jobsite to the next. Mr. McNeeley brought his teenage nephew to work with him on July 26 and allowed his nephew to enter the bank where Mr. McNeeley was cleaning so that the nephew could use the restroom. At 10:15 p.m., Mr. McNeeley left Community State Bank. Mr. Garcia was surreptitiously surveilling Mr. McNeeley and noted the time of Mr. McNeeley's departure from that location. Mr. Garcia knew that Mr. McNeeley was then supposed to travel directly to the Emco Dixon jobsite for the last cleaning assignment of the evening. Mr. Garcia traveled to that location, but Mr. McNeeley did not arrive at that location in a reasonable time. At midnight, Mr. McNeeley finally arrived at the jobsite after an hour and 45 minute unauthorized break. Mr. McNeeley had gone home without authorization and without clocking out. Mr. Garcia surreptitiously observed Mr. McNeeley's arrival at the Emco Dixon jobsite. Mr. McNeeley remained just 39 minutes at the Emco Dixon location. Mr. McNeeley remotely clocked out at 12:39 a.m. Mr. McNeeley did not report his extended unauthorized break when he reported his work time to the employer for payroll purposes. Mr. Garcia checked the Emco Dixon jobsite after Mr. McNeeley departed and observed that Mr. McNeeley had not completed the assigned cleaning duties.

On July 27, 2016, the employer notified Mr. McNeeley that he was suspended for theft of time. On August 3, 2016, the employer notified Mr. McNeeley that he was discharged for theft of time. Prior to the discharge, Mr. McNeeley acknowledged going home for 45 minutes on July 26, but asserted he had done so with Mr. Garcia's knowledge and approval.

Mr. McNeeley established a claim for benefits that was effective July 31, 2016 and received \$1,573.00 in benefits for the period of July 31, 2016 through October 29, 2016. Marsden Building Maintenance, L.L.C., is included as a base period employer for purposes of the claim.

On August 29, 2016, a Workforce Development claims deputy held a fact-finding interview to address Mr. McNeeley's separation from the employment. Mr. McNeeley participated in the fact-finding interview and provided an intentionally misleading statement in which he falsely asserted he was in contact with Mr. Garcia during the unauthorized extended paid break. Neither the employer nor ADP/Equifax made a person available for the fact-finding interview. ADP/Equifax had submitted documents for consideration at the fact-finding interview. Those documents included a letter from ADP in question-and-answer format, that provided the dates of

employment, the claimant's job title, and a summary statement of incident that triggered the discharge. ADP provided additional documentation that restated the summary statement of the basis for the discharge. ADP provided an acknowledgment form that showed the claimant's receipt of the employee handbook and the break/meal policy. ADP provided a personnel action form that provided minimal information indicating the claimant was discharged for theft of time. ADP provided a copy of the Break and Meal Period Policy. ADP provided two prior written reprimands for attendance.

#### **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 Mr. McNeeley knowingly and intentionally attempted to defraud the employer by taking an unauthorized one hour and 45 minute break on July 26, 2016 and reporting his work time as if he had been engaged in work on behalf of the employer during the entirety of his shift. Mr. McNeeley's unauthorized absence from his work duties and his intentional dishonesty demonstrated a willful and wanton disregard of the employer's interests. It was necessary for the employer to be able to trust Mr. McNeeley to perform his work duties as assigned and to accurately report his work time. This was especially true, given the nature of the jobsites Mr. McNeeley was assigned to clean. Mr. McNeeley fundamentally undermined that trust relationship.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. McNeeley was discharged for misconduct. Accordingly, Mr. McNeeley 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. McNeeley must meet all other eligibility requirements.

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 claimant received \$1,573.00 in benefits for the period of July 31, 2016 through October 29, 2016, but has been denied benefits as a result of this decision. Those benefits constitute an overpayment of benefits.

Iowa Administrative Code rule 817 IAC24.10(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.

The employer's paperwork did not satisfy the participation requirement. However, because Mr. McNeeley provided an intentionally misleading statement at the fact-finding interview, he is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including benefits already paid.

**DECISION:**

The August 30, 2016, reference 02, decision is reversed. The claimant was discharged on August 3, 2016 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 is overpaid \$1,573.00 in benefits for the period of July 31, 2016 through October 29, 2016. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including benefits already paid.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs