

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD R HERRINGTON**  
Claimant

**APPEAL NO. 08A-UI-04442-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DUALE INDUSTRIES INC**  
**WENDY'S**  
Employer

**OC: 04/06/08 R: 02**  
**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct  
Iowa Code Section 96.3(7) – Recovery of Overpayment

**STATEMENT OF THE CASE:**

Duale Industries, Inc., doing business as Wendy's, filed a timely appeal from the April 28, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 23, 2008. Claimant Richard Herrington provided a telephone number for the hearing, but was not available at that number and the time of the hearing. Jeff Mosiman, Owner, represented the employer and presented additional testimony through Co-manager Kathy Clapp. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant.

The hearing had originally been scheduled for May 21, 2008 at 10:00 a.m., and notice had been mailed to the parties on May 9, 2008. On May 21, 2008, Mr. Herrington and Ms. Clapp did not appear until a considerable time after the scheduled start of the hearing. Based on the late arrival of the parties and the limited time allotted for the hearing, the administrative law judge notified the parties on the record that the hearing would be rescheduled to Friday, May 23, 2008 at 8:00 a.m. Both parties, including Mr. Herrington, indicated they could appear at the rescheduled time.

**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.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Richard Harrington was employed by Wendy's as a part-time crew member/laborer from May 14, 2007 until January 14, 2008, when Owner Jeff Mosiman and Co-Manager Kathy Clapp discharged him for smoking marijuana in the men's restroom at the restaurant. Ms. Clapp notified Mr. Herrington of the discharge. At approximately 10:30 p.m. on January 13, Mr. Herrington

went to the men's restroom during a break. The employer's dining room had closed at 10:00 p.m., the dining room was empty and the outside doors to the restaurant were locked. Shift Supervisor Damien Mapp went to the men's restroom shortly thereafter. Mr. Mapp then notified Co-manager Kathy Clapp that she needed to go observe the men's restroom. Ms. Clapp immediately went to the men's restroom, when she smelled the odor of burnt marijuana and observed marijuana smoke. Ms. Clapp confronted Mr. Herrington, who initially denied smoking marijuana. Mr. Herrington then admitted that he had in fact been smoking marijuana in the men's restroom. Mr. Herrington asked Ms. Clapp to reprimand him without discharging him from the employment. Ms. Clapp told Mr. Herrington that she would get back to him the next day. Ms. Clapp had conducted further investigation of the men's restroom and had located marijuana seeds and stems on the sink.

The employer's written work rules indicate that possession or use of controlled substances will be grounds for immediate discharge. Mr. Herrington received a copy of the work rules.

In making the decision to discharge Mr. Herrington, Ms. Clapp also considered an incident in early December when Mr. Herrington and a coworker had engaged in fighting in the workplace.

Mr. Herrington established a claim for unemployment insurance benefits that was effective April 6, 2008 and has received benefits.

#### **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).

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 greater weight of the evidence indicates that Mr. Herrington did indeed possess and smoke marijuana on the employer's premises on January 13, 2008. Mr. Herrington's conduct was in clear disregard of the interests of the interests of the employer, in violation of the employer's work rules, and illegal.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Herrington was discharged for misconduct. Accordingly, Mr. Herrington is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Herrington.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Herrington had been deemed eligible for the benefits he received, those benefits constitute an overpayment that Mr. Herrington must repay to Iowa Workforce Development. Mr. Herrington is overpaid \$624.00.

**DECISION:**

The Agency representative's April 28, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$624.00.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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