

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TIMOTHY A TALLEY**  
Claimant

**CINTAS CORPORATION NO 2**  
Employer

**APPEAL 17A-UI-12111-JCT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 10/22/17  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

The employer filed an appeal from the November 17, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 14, 2017. The hearing was rescheduled to December 21, 2017 to allow both parties to receive all documents. At the second hearing, the claimant participated personally. The employer participated through Sanborn Darling, service manager. Employer Exhibits 1-24, Claimant Exhibits 25-78, and Department Exhibits 79-110 were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?  
Can any charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a services sales representative and was separated from employment on October 20, 2017, when he was discharged for alleged dishonesty and failure to service clients (Employer Exhibit 24).

On October 9, 2017, the claimant was issued a documented verbal warning in response to his "trucount scanning" numbers. The claimant's job duties included traveling from client to client site, where he would both pick up and deliver customer products including clothing/garments and work mats, amongst other products. As part of the employer's inventorying of product, the claimant was required to use a handheld scanning gun and scan all garments being picked up

at the client site, and then print the client a list off before departing. The same garment would then be scanned into the cleaning department and out before it left the facility. In response to the claimant's failure to scan all garments in for three consecutive weeks, he was provided the warning, copy of the trucount policy and a copy of his job description (Employer Exhibits 2, 6, 7, 8, 9, 10, 11, 12 and 13). The claimant denied being provided the trucount policy and a copy of his job description when he was hired.

On October 12, 2017, the claimant was placed on paid suspension while the employer investigated the claimant's servicing of two accounts on October 10, 2017 for customers Estes, and Central Iowa Ready Mix (Employer Exhibits 14, 15, 16). Based on customer complaints, (Employer Exhibit 17, 18, 19, 20) the employer believed the claimant had not serviced either account on October 10, 2017.

The claimant asserted that he did not service Estes because he was running late and had a court issued visit with his child (Claimant Exhibit 77 ) and made Mr. Darling aware that he had not completed the visit (Employer Exhibit 16 and Claimant Exhibit 67). He completed the route on October 12, 2017. The claimant also stated he had partially serviced the Central Iowa Ready Mix account on October 10, 2017, handling the mats but not the garments (Department Exhibit 81 and Employer Exhibit 15). He had previously been running behind on his October 3, 2017 stop to the same client, resulting in a delay of services and the claimant to credit the client (Department Exhibit 81). At the afternoon sales meeting, the claimant told Mr. Darling, and then completed the account on October 12, 2017 (Employer Exhibit 15) The claimant stated he also informed Mr. Chris Jackson, in addition to Mr. Darling, that the uniforms had not been completed for Central Iowa Ready Mix on October 10, 2017.

Mr. Darling did not participate in the investigation of the claimant's servicing of accounts or decision to discharge. No employer representative who performed the investigation or made the decision to discharge the claimant participated in the hearing. In contrast, the claimant participated, denying dishonesty and stating he made the employer aware that he had been running behind on his accounts. The employer had acknowledged the claimant was in need of help to complete his routes before discharge (Claimant Exhibit 68).

The administrative record reflects that claimant has received unemployment benefits in the amount of \$3,056.00, since filing a claim with an effective date of October 22, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview or make a witness with direct knowledge available for rebuttal. Sanborn Darling, service manager, attended.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment

insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). 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. 871 IAC 24.32(8).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Honesty is a reasonable, commonly accepted duty owed to the employer. The employer discharged the claimant based upon its assertion that the claimant failed to service accounts and was dishonest about it (Employer Exhibit 24). The credible evidence does not support the claimant was dishonest in his dealings or intentionally neglected his client accounts. Rather, the claimant made the employer aware that he had not fully serviced the Estes account on October 10, 2017, (Employer Exhibit 16 and Claimant Exhibit 67) and that he had only partially serviced the Central Iowa Ready Mix account (Employer Exhibit 15). Further, the credible evidence establishes the employer was aware that the claimant was in need of help in completing his routes (Claimant Exhibit 68).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The administrative law judge is cognizant of the impact on customer relations that not timely servicing or being dishonest about service provided, could have on the employer. Mr. Darling's testimony of the final incident was based solely on hearsay evidence as he did not complete the investigation or make the decision to discharge the claimant. He lacked specific information or credible evidence that the claimant's conduct was dishonest or misleading. In contrast, the claimant offered reasonable explanations for his failure to complete all accounts, and that he made the employer aware of the status of the accounts, and did not represent them being complete when they were not. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed provided the claimant is otherwise eligible.

Because the claimant is eligible for benefits, the issues of overpayment and relief of charges are moot.

**DECISION:**

The November 17, 2017, (reference 01) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld shall be paid, provided he is otherwise eligible. The claimant has not been overpaid benefits. The employer's account is not relieved of charges associated with the claim.

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Jennifer L. Beckman  
Administrative Law Judge

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Decision Dated and Mailed

jlb/rvs