

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

NATHAN A PAYNE
Claimant

APPEAL NO. 18A-UI-08797-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
Employer

OC: 07/22/18
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 10, 2018, 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 the Benefits Bureau deputy's conclusion that the claimant was discharged on July 27, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on September 7, 2018. Claimant Nathan Payne did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Curtis Mangler represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 9 into evidence. The administrative law judge took official notice of the fact-finding materials

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 overpaid 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: Nathan Payne was employed by Per Mar Security & Research Corporation as a part-time security guard from 2011 until July 26, 2018, when Curtis Mangler, Operations Manager, discharged him from the employment for sleeping on the job. Mr. Payne was assigned to perform after-hours security services at the Allsteel manufacturing plant in Muscatine. Mr. Payne last performed work at that plant on Sunday, July 22, 2018. On that day, Mr. Payne was scheduled to work from 8:00 a.m. to 8:00 p.m. Mr. Payne's security duties involved making periodic rounds of the

Allsteel facility to prevent and address security issues at the facility while the facility was not in operation. When Mr. Payne was on-duty at the Allsteel facility, he would be the only Per Mar employee onsite, but one or more Allsteel employees could also be onsite. On Wednesday, July 25, 2018, Allsteel security representative Mike Schmidt contacted Mr. Mangler by text message to request that Mr. Payne not return to the Allsteel facility. Attached to Mr. Schmidt's text message was a photograph of Mr. Payne sleeping on a couch in the Allsteel plant on July 22 at a time when Mr. Payne was supposed to be performing his work duties. The photograph showed Mr. Payne out of uniform, sprawled on a couch, and clearly sleeping. When Mr. Mangler spoke to Mr. Payne on July 26 about the incident, Mr. Payne stated that he might have laid down due to a health issue and might have fallen asleep. Mr. Payne had not previously advised the employer of any health issue that would necessitate laying down on the job and had not requested an accommodation for any such purported medical condition. The employer provided Mr. Payne with written work rules at the time of hire and had Mr. Payne sign to acknowledge the work rules. The work rules prohibited sleeping on the job, being out of uniform, and otherwise engaging unprofessional conduct while on duty.

Mr. Payne established a claim for unemployment insurance benefits that was effective July 22, 2018. Per Mar Security is the sole base period employer for purposes of the claim. Mr. Payne received \$906.00 in benefits for the six weeks between August 5, 2018 and September 15, 2018.

On August 9, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Payne's separation from the employer. Taylor Boesen, Per Mar Human Resources representative, represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

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).

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 Iowa Administrative Code rule 871-24.32(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 Iowa Administrative Code rule 871-24.32(4).

Sleeping on the job may constitute misconduct in connection with employment that will disqualify a claimant for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart. The most recent sleeping incident involved the employer discovering the claimant sleeping on his back in a restroom, an area away from his work station. Mr. Hurtado asserted that his need to rest his back was attributable to the work. The Court noted that Mr. Hurtado had not notified his employer of the alleged work-related health condition. The Court found sufficient evidence in the record to conclude that Mr. Hurtado demonstrated a willful and wanton disregard of the employer's interests. *Hurtado*, 393 N.W.2d at 311.

The weight of the evidence in the record establishes a discharge based on misconduct in connection with the employment. The weight of the evidence established that on July 22, 2018, Mr. Payne knowingly and intentionally violated the employer's policies by appearing for work out of uniform and by intentionally sleeping on the job at a time when he was charged with maintaining security at the Allsteel facility. Mr. Payne's conduct demonstrated an intentional and substantial disregard of the employer's interests and of the employer's client's interests. Mr. Payne 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. Payne 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 base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Payne received \$906.00 in benefits for the six weeks between August 5, 2018 and September 15, 2018, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Payne received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Payne is required to repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to Mr. Payne.

DECISION:

The August 10, 2018, reference 01, decision is reversed. The claimant was discharged on July 26, 2018 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 \$906.00 in benefits for the six weeks between August 5, 2018 and September 15, 2018. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs