

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERI A OEHLER-TERMAN
Claimant

APPEAL NO. 15A-UI-10219-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VENUWORKS OF CEDAR RAPIDS IA LLC
Employer

OC: 08/02/15
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 September 4, 2015, reference 01, decision that allowed benefits to the claimant provided she 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 November 21, 2014, for no disqualifying reason. After due notice was issued, a hearing was held on September 24, 2015. Claimant Cheri Oehler-Terman had not provided a telephone number for the hearing in response to the hearing notice instructions and did not participate. Grant Nichols of Merit Resources represented the employer and presented testimony through David Kelly, Jana Graber, and Nicole Wright. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit One 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.

Ms. Oehler-Terman contacted the Appeals Bureau at 3:46 p.m. on September 24, 2015 with regard to the 3:00 p.m. hearing she had missed. By that time, the hearing record had closed and the employer had been dismissed. Ms. Oehler-Terman confirmed proper notice of the hearing. Ms. Oehler-Terman had not followed the instructions to provide a telephone number where she could be reached for the hearing. Ms. Oehler-Terman did not provide good cause to reopen the hearing record. See Iowa Admin. Code r. 871-26.14(7)(c) (Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record).

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 is required to 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: Cheri Oehler-Terman was employed by Venuworks of Cedar Rapids, L.L.C., as a part-time concession worker from September 2014 until November 21, 2014, when David Kelly, Director of Food and Beverage, and Nicole Wright, Direct of Finance, discharged her from the employment for abandoning her assigned concession cart.

The incident that triggered the discharge occurred on November 21, 2014. On that day, the employer was operating multiple concession stands at the U.S. Cellular Center in Cedar Rapids in connection with a Cirque du Soleil performance. Ms. Oehler-Terman was assigned to man a portable ice cream stand. The stand was strategically positioned by the mail entrance for maximum traffic and sales. The employer provided Ms. Oehler-Terman with a \$400.00 "bank" to facilitate making change for customers. The money was in an unlocked cash drawer. Ms. Oehler-Terman clocked in at 5:22 p.m. The employer's break policy provided employees with a break after they had worked four hours. The show was set to start at 7:30 p.m. and set to conclude at 9:30 p.m. At 7:15 p.m., when the flow of potential customers past the cart was at its peak, Ms. Oehler-Terman abandoned her cart to go to the other side of the arena to get something to eat. Another employee alerted Mr. Kelly to the abandoned cart. When Mr. Kelly arrived at Ms. Oehler-Terman's assigned cart, another employee was taking advantage of Ms. Oehler-Terman's absence by helping themselves to ice cream. Another manager located Ms. Oehler-Terman waiting in line at a concession stand at the other end of the arena. Ms. Oehler-Terman said she had left her stand because she wanted to get something to eat. Ms. Oehler-Terman minimized the employer's concern regarding her abandonment of the cart.

Ms. Oehler-Terman established a claim for unemployment insurance benefits that was effective August 2, 2015. So far, Ms. Oehler-Terman has received \$3,663.00 in benefits for the period of August 2, 2015 through October 3, 2015.

On September 3, 2015, a Workforce Development claims deputy held a fact-finding interview to address Ms. Oehler-Terman's separation from the employment. Mr. Kelly and other employer representatives participated in the fact-finding interview.

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 evidence in the record establishes a willful and wanton disregard of the employer's interests and violation of standards of conduct that the employer reasonably expected of Ms. Oehler-Terman. Ms. Oehler-Terman's primary purpose at the U.S.Cellular Center on the last day of the employment was to generate revenue for the employer by selling ice cream to patrons. Ms. Oehler-Terman's secondary purpose was to safeguard the employer's equipment and assets. Ms. Oehler-Terman abandoned her post at the height of business. The employer

lost revenue. Ms. Oehler-Terman left the employer's substantial cash bank as well as the employer's product unprotected. In abandoning her assigned cart, Ms. Oehler-Terman also violated the employer's break policy. Ms. Oehler-Terman had been at work less than two hours when she abandoned her concession stand. She showed sufficient willful disregard for the employer's interests to constitute misconduct in connection with the employment. Accordingly, Ms. Oehler-Terman 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 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 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 benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid \$3,663.00 in benefits for the period of August 2, 2015 through October 3, 2015. Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The September 4, 2015, reference 01, decision is reversed. The claimant was discharged on November 21, 2014 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant was overpaid \$3,663.00 in benefits for the period of August 2, 2015 through October 3, 2015. The claimant is required to repay the overpayment. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs