

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ZACHARY T JONES
Claimant

APPEAL NO. 19A-UI-06825-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAREWAY STORES INC
Employer

OC: 08/04/19
Claimant: Respondent (2)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 23, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and that the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant's July 2, 2019 discharge was not based on a current act. After due notice was issued, a hearing was held on September 20, 2019. Claimant Zachary Jones did not comply with the hearing notice instructions to register a telephone number for the appeal hearing and did not participate. Theresa McLaughlin represented the employer and presented testimony through Michael Johnson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant, which record reflects that no benefits have been disbursed to the claimant in connection with the August 4, 2019 original claim. Exhibits 1 through 6 were received into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance 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: Zachary Jones was employed by Fareway Stores, Inc. as a full-time Meat Market Clerk from until July 2, 2019. Mr. Jones began the employment in 2013. Mr. Jones worked at the north Ames Fareway store. On July 1, 2019, the employer investigated a concern that Mr. Jones had recently allowed a friend who was not an employee of the north Ames Fareway to work at the store when the Meat Manager, Michael Johnson, was away from the store. During that investigation, Mr. Jones' coworkers told Mr. Johnson that Mr. Jones had taken merchandise from the store and converted it to personal use in early May 2019 without paying for the merchandise. The employer had previously been unaware of the alleged theft. On July 1, 2019, Mr. Johnson reviewed store surveillance from early May 2019 and located video surveillance that that showed Mr. Jones taking sushi from a display cooler at the front of the store after the store had

closed. Mr. Jones was responsible for taking unsold sushi to the dumpster at the end of the business day. The video surveillance showed Mr. Jones exiting the store and then walking along the side of the store toward the dumpster. The video showed that before Mr. Jones reached the dumpster, he turned toward where his vehicle was parked in the parking lot and then took the sushi to his car instead of throwing it away in the dumpster. Mr. Jones then departed. The employer has a written policy that prohibits theft and intentional dishonesty. The policy is in the employee handbook that the employer provided to Mr. Jones in 2016. Mr. Jones was aware at all relevant times that he was prohibited from converting store merchandise to personal use without first paying for the merchandise. The video surveillance record indicated an intention to deceive store staff and the employer into believing that Mr. Jones had thrown away the sushi in the dumpster.

On July 2, 2019, Mr. Johnson questioned Mr. Jones about the May 8 conduct. Mr. Jones admitted to taking the sushi with him in his car instead of throwing it in the dumpster. Mr. Jones asserted that he had thrown the sushi away when he got home. The employer discharged Mr. Jones that same day for theft and dishonesty.

Mr. Jones established an original claim for benefits that was effective August 4, 2019, but has received no benefits in connection with the claim.

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 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).

The evidence in the record establishes a discharge based on a "current act" of misconduct in connection with the employment. Unless Mr. Jones were to purchase the sushi product, his authority to possess the sushi product was limited to the authority delegated by the employer. Mr. Jones knowingly and intentionally exceeded that authority by converting the sushi product to personal use without paying for the product. In addition, Mr. Jones knowingly and intentionally violated the employer's policy and by not discarding the sushi in the dumpster pursuant to the established protocol. Mr. Jones knowingly and intentionally attempted to deceive the employer in connection with the theft of merchandise by faking an initial path toward the dumpster. Mr. Jones' conduct demonstrated an intentional and substantial disregard for the employer's interests. Even though the conduct occurred on May 8, 2019, it did not come to the employer's attention until July 1, 2019, when Mr. Jones' coworkers mentioned the conduct to the employer. The employer had no reason to look into the conduct before July 1, 2019. Once the employer became aware of the alleged conduct and the relevant time frame, the employer promptly investigated the matter and discharged Mr. Jones the next day. Mr. Jones is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Jones must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

Because no benefits have been disbursed in connection with the claim, there is no overpayment of benefits to address.

DECISION:

The August 23, 2019, reference 01, decision is reversed. The claimant was discharged on July 2, 2019 for a current act of 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs