

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DAMON B JACOBSEN
Claimant

APPEAL NO. 18A-UI-06161-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WINNEBAGO INDUSTRIES
Employer

OC: 05/06/18
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 May 25, 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 May 3, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on June 20, 2018. Claimant Damon Jacobsen did not respond to the hearing notice instructions to register a telephone number for the hearing and did not participate. Susan Gardner 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 4 into evidence. The materials from the May 18, 2018 fact-finding interview were not available to the Appeals Bureau as of June 20, 2018.

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 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: Damon Jacobsen was employed by Winnebago Industries as a full-time laborer from July 2017 until May 3, 2018, when Susan Gardner discharged him from the employment for entering false information on an employment application and entering the same false information on a Work Opportunity Tax Credit (WOTC) Individual Characteristics Form (ICF). Immediately prior to

commencing the employment, Mr. Jacobson completed an electronic application. Mr. Jacobsen manually signed the application on July 10, 2017. Immediately above the place for Mr. Jacobsen's signature on the application was the heading "IMPORTANT – READ BEFORE SIGNING." Beneath that heading were 15 lines of small-font text that began with an affirmation that Mr. Jacobsen was eligible to work in the United States and that information on the application was correct to the best of his knowledge. The employment application included a question regarding whether Mr. Jacobsen had previously worked for Winnebago Industries. Mr. Jacobson marked the "no" box. Mr. Jacobsen had in fact previously been employed by Winnebago Industries during the period of November 2002 and March 2006 and had been discharged from that earlier employment for allegedly possessing a controlled substance on company property. At the same time Mr. Jacobsen signed the employment application, he also completed and signed applicant information on a Work Opportunity Tax Credit (WOTC) Individual Characteristics Form (ICF). Because Mr. Jacobsen resided in Winnebago County, a Designated Rural Renewal county, the employer could claim a federal tax credit for hiring Mr. Jacobsen, provided Mr. Jacobsen had not previously worked for the employer. Based on Mr. Jacobsen's false assertion that he had not previously worked for the employer, the employer claimed the federal tax credit in connection with hiring Mr. Jacobsen.

The employer discovered the prior period of employment at the end of April 2018 while the employer was conducting an audit of 401K retirement accounts.

The employer has an employee handbook that the employer provided to Mr. Jacobsen on July 17, 2017. The employer had Mr. Jacobsen sign to acknowledge receipt of the handbook. The handbook contained a section on disciplinary guidelines, wherein the employer listed infractions that could result in disciplinary action. Listed first was the following: "Falsification of employment application, medical slips, or other Company records or documents is grounds for termination."

Mr. Jacobsen established an original claim for benefits that was effective May 6, 2018 and received \$1,819.00 in benefits for the four-week period between May 6, 2018 and June 2, 2018. Winnebago Industries is a base period employer for purposes of the claim. On May 18, 2018, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview to address Mr. Jacobsen's separation from the employment. Susan Gardner represented that employer at the fact-finding interview. Ms. Gardner provided an oral statement and complied the same day with the deputy's request that she submit the application and WOTC form.

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).

Iowa Admin. Code r. 871-24.32(6) provides:

Discharge for misconduct.

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in

jeopardy, such falsification shall be an act of misconduct in connection with the employer.

Iowa Admin. Code r. 871-24.32(6) provides:

Discharge for misconduct.

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The evidence in the record establishes misconduct in connection with the employment that disqualifies Mr. Jacobsen for unemployment insurance benefits. The evidence supports the employer's assertion that Mr. Jacobsen knowingly, intentionally and falsely indicated on his July 10, 2017 application and the Work Opportunity Tax Credit Individual Characteristics Form that he had not previously worked for the employer. Mr. Jacobsen's intentional failure to disclose the prior employment denied the employer an opportunity to consider whether it wished to rehire Mr. Jacobsen in light of the prior concern regarding illicit drug possession on company property. Mr. Jacobsen's intentionally false response on the WOTC ICF form exposed the employer to potential civil and criminal penalty for claiming an unauthorized federal tax credit in connection with hiring Mr. Jacobsen. See 18 U.S.C. Section 1001 (regarding federal criminal penalty for providing false statements). Mr. Jacobsen's conduct demonstrated an intentional and substantial disregard of the employer's interests. Though the misconduct occurred at the start of the 10-month employment, it only came to the employer's attention a few days prior to the discharge and, therefore, constituted a current act for unemployment insurance purposes.

Because the evidence in the record and application of the appropriate law establishes a discharge for misconduct in connection with the employment, Mr. Jacobsen 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. Jacobsen 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 employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Jacobsen received benefits, but has been disqualified for those benefits as a result of this decision. Accordingly, Mr. Jacobsen was overpaid \$1,819.00 in benefits for the four-week period between May 6, 2018 and June 2, 2018. Because the weight of the evidence establishes that the employer participated in the fact-finding interview, Mr. Jacobsen is required to repay the overpayment. The employer's account will be relieved of liability for benefits including liability for benefits already paid in connection with the claim.

DECISION:

The May 25, 2018, reference 01, decision is reversed. The claimant was discharged on May 3, 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 \$1,819.00 in benefits for the four-week period between May 6, 2018 and June 2, 2018. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid in connection with the claim.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs