

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRAVIS L DENNEY
Claimant

APPEAL NO. 15A-UI-10805-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 08/30/15
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 16, 2015, 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 an Agency conclusion that the claimant had been discharged on August 28, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on October 12, 2015. Kristi Fox, Human Resources Clerk, represented the employer. Claimant Travis Denney did not participate. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of documenting the employer's participation in the fact-finding interview.

The Appeals Bureau was unable to serve Mr. Denney with notice of the hearing because he had provided the Agency with an incomplete address of record at the time he established his claim for benefits and had not updated the address of record. The United States Postal Service returned Mr. Denney's hearing notice to Workforce Development on October 8, 2015, with an attached sticker that indicated there was an insufficient address on the correspondence and that the Postal Service was unable to forward the correspondence. The claimant had not provided an apartment number. At the time Mr. Denney established his claim for benefits, he had also provided a telephone number that was no longer in service at the time the Appeals Bureau staff tried to reach him upon return of his hearing notice. The administrative law judge attempted to reach the claimant at a number the employer had on its exhibits. The administrative law judge left a voicemail message at that number, but did not hear back from anyone. The administrative judge did a Google search of the claimant's name and located an apartment number, Apartment 8, that may or may not be the correct apartment number. The lack of notice to the claimant is attributable to the claimant not providing a complete and up-to-date address of 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: Travis Denney was employed by Tyson Fresh Meats, Inc., from February 2015 until August 28, 2015, when Teri Rottinghaus, Human Resources Manager, discharged him for theft. On August 20, 2015, Mr. Denney used coworker Torene Harper's cafeteria PIN to obtain cigarettes and an energy drink without paying for the items. Instead, the cost of the items was assessed to Mr. Harper's cafeteria account. A cafeteria worker reported the incident to her supervisor, who in turn reported the incident to Ms. Rottinghaus. Ms. Rottinghaus conducted an investigation that included obtaining written statements from Mr. Harper and Mr. Denney. Mr. Denney asserted in his written statement that he had Mr. Harper's permission to use the PIN. Mr. Harper provided a much more detailed statement that laid out how the theft came to light, Mr. Harper's contact with Mr. Denney regarding the theft, how Mr. Denney had obtained Mr. Harper's PIN, and Mr. Denney's attempts to persuade Mr. Harper not to discuss the theft with the employer. The employer had a policy that prohibited sharing of ID badges or PINs. Mr. Harper was no longer with the employer at the time of the appeal hearing. The employer witness' knowledge of the matter was limited to Ms. Rottinghaus' notes, the written statements of Mr. Harper and Mr. Denney, and the claimant's statements at the time of the fact-finding interview.

Mr. Denney established a claim for benefits that was effective August 30, 2015 and received \$449.00 in benefits for the period of August 30, 2015 through October 3, 2015.

On September 15, 2015, a Workforce Development claims deputy held a fact-finding interview to address Mr. Denney's separation from the employment. Kristi Fox, Human Resources Clerk, represented the employer at that proceeding.

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).

Though the evidence in the record consisted entirely of hearsay, the administrative law judge concludes that the information contained in the written statements as well as the employer's documentation of its investigation provide sufficient evidence to establish that Mr. Denney did indeed commit theft from a coworker on August 20, 2015. Mr. Denney's conduct constituted misconduct in connection with the employment. Accordingly, Mr. Denney is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he 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 \$449.00 in benefits for the period of August 30, 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 16, 2015, reference 01, decision is reversed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The claimant was overpaid \$449.00 in benefits for the period of August 30, 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