

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHANIEL J AL-KHANFAR
Claimant

APPEAL NO. 12A-UI-00584-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HY-VEE INC
Employer

OC: 11/06/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 9, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 9, 2012. Claimant Nathaniel Al-Khanfar did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Julia Day of Corporate Cost Control represented the employer and presented testimony through Jon Elswick, Kylie Malloy, and Danielle Huffman. Exhibits One, Two and Three were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nathaniel Al-Khanfar was employed by Hy-Vee as a part-time customer service clerk in Ottumwa from April 2011 until November 6, 2011, when Jon Elswick, Manager of Perishables, discharged him for violating the employer's alcohol policy and for dishonesty. During his shift on November 5, Mr. Elswick purchased alcohol at a gas station and brought the alcohol into the Ottumwa Hy-Vee store in two coffee cups so that he could consume it and share it with one or more assistant managers. One of the assistant managers conspired in bringing the alcohol into the store. The other, Kylie Malloy, was offered a drink from one of the cups and was caught off guard when she realized the cup contained alcohol. Later in the shift, Mr. Al-Khanfar and one of the assistant managers went to Mr. Al-Khanfar's car to refill the cups with alcohol. Ms. Malloy reported the incident to store management the next morning. When Mr. Elswick interviewed Mr. Al-Khanfar about the incident, Mr. Al-Khanfar initially asserted that the coffee cups had only contained coffee. Mr. Al-Khanfar and one of the assistant managers had conspired to mislead the employer into thinking the coffee cups only contained coffee. Later in the interview with Mr. Elswick, Mr. Al-Khanfar admitted that the cups contained alcohol. Mr. Al-Khanfar added that he had brought the alcohol into the workplace because one of the assistants was having a bad day and he wanted to make the assistant's day better.

The employer had a written Code of Conduct policy that prohibited possession of alcohol on company property. The policy obviously did not apply to authorized possession for purposes of an authorized sale of alcohol to a customer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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.

871 IAC 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.

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 Mr. Al-Khanfar knowingly and intentionally violated the employer's alcohol possession policy, conspired with a coworker to violate the policy, conspired with a coworker to mislead the employer about the conduct, and was initially dishonest with the employer when interviewed by the employer. Mr. Al-Khanfar's conduct was in willful and wanton violation of the employer's interests and violated the standards of conduct the employer reasonably expected of him. Mr. Al-Khanfar was discharged for misconduct. Accordingly, Mr. Al-Khanfar 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 employer's account shall not be charged for benefits paid to Mr. Al-Khanfar.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's January 9, 2012, 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 employer's account shall not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs