

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATHEW S HALL
Claimant

APPEAL NO. 13A-UI-11515-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

OC: 08/25/13
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 October 1, 2013, 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. After due notice was issued, a hearing was held on November 5, 2013. Claimant Mathew Hall did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Ashley Scott represented the employer and presented additional testimony through Ellen Carlson. The administrative law judge took official notice of the agency's administrative record of benefits disbursed to the claimant. Exhibits One through Five 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: Aerotek, Inc., is a staffing agency. Mathew Hall performed work for the Aerotek in three temporary work assignments. The most recent assignment was at Wells Fargo Home Mortgage. The assignment started in February 2013. The assignment was full-time, temp-to-hire. Mr. Hall last performed work in the assignment on or about August 15, 2013. Mr. Hall's work hours in the assignment, as of May 6, 2013, were 1:30 p.m. to 10:00 p.m., Monday through Friday.

On Friday, August 16, 2013, Mr. Hall was absent from work without notifying Aerotek or Wells Fargo. If Mr. Hall needed to be absent, the Aerotek and Wells Fargo policies required that he notify Aerotek and Wells Fargo prior to the start of his shift. These policies were reviewed with Mr. Hall when he started the assignment and on a monthly basis at meetings that Aerotek Ellen Carlson held onsite at Wells Fargo. On August 19, Wells Fargo Loan Administration Manager Matthew Kauzlarich notified Ms. Carlson that he was ending Mr. Hall's assignment due to attendance. On August 19, Ms. Carlson contacted Mr. Hall to let him know the assignment was being ended due to attendance. Mr. Hall said he had been absent on August 16 for personal

reasons, but did not give a reason for not notifying Aerotek or Wells Fargo. The discharge from the Wells Fargo assignment was also a discharge from Aerotek.

In making the decision to end the assignment, the Wells Fargo manager considered earlier absences. Aerotek considered the same absences in making the decision to discharge Mr. Hall from its employ. On April 3, 2013, Mr. Hall was absent from work due to illness and notified both companies. Mr. Hall was again absent due to illness on April 4, but notified only Wells Fargo. On April 26, 2013, Mr. Hall was late to work for personal reasons and then left work early due to illness. On April 29, Mr. Hall was again late getting to work for personal reasons. On May 6, Mr. Hall was late getting to work because he had forgotten that his start time had changed to 1:30 p.m. that day. On June 13, 2013, Mr. Hall was absent due to illness, but only notified Wells Fargo. Mr. Hall had also called in sick on July 3, 2013, but had only notified Wells Fargo. On August 8, Mr. Hall was absent for personal reasons and notified Aerotek.

On August 19, the Wells Fargo manager sent Aerotek an email message in which the manager asserted that Mr. Hall had two additional attendance "occurrences" during the week of August 12-16. The Wells Fargo manager did not provide additional information the alleged attendance occurrences and Aerotek does not have any additional information about them.

In an email to Aerotek dated July 3, the Well Fargo manager indicated that Mr. Hall had also had taken an extended lunch break on May 7.

Mr. Hall established a claim for unemployment insurance benefits that was effective August 25, 2013. To date, Mr. Hall has received \$2,010.00 in benefits for the period of August 25, 2013 through November 2, 2013.

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).

There is sufficient evidence in the record to establish excessive unexcused absences. The evidence in the record establishes a no-call/no-show absence on August 16, 2013. The absence was an unexcused absence under the applicable law. The evidence establishes an additional unexcused absence on April 4, when Mr. Hall was absent due to illness, but only notified Wells Fargo. The evidence establishes an unexcused absence on April 26, when Mr. Hall was late for personal reason. The early departure from work late that day was an excused absence because it was due to illness and Wells Fargo was notified before Mr. Hall left. The evidence establishes an unexcused absence on April 29, when Mr. Hall was again late getting to work for personal reasons. The evidence establishes an unexcused absence on May 6, Mr. Hall was late getting to work because he had forgotten that his start time had changed to 1:30 p.m. that day. The evidence establishes an unexcused absence on June 13, 2013, when Mr. Hall was absent due to illness, but only notified Wells Fargo. The evidence establishes an unexcused absence on July 3, when Mr. Hall was absent due to illness, but had only notified Wells Fargo. The evidence establishes an unexcused absence on August 8, when Mr. Hall was again absent for personal reasons.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Hall was discharged for misconduct. Accordingly, Mr. Hall 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 will not be charged for benefits paid for the period on or after the entry date of this decision.

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. Because Mr. Hall received benefits for which he has now been deemed ineligible, those benefits constitute an overpayment of benefits. To date, Mr. Hall is overpaid \$2,010.00 in benefits for the period of August 25, 2013 through November 2, 2013.

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.

The administrative law judge will remand the matter to the Claims Division for determination of whether the employer participated in the fact-finding interview, whether the employer's account may be relieved of liability for benefits through November 2, 2013, and for determination of whether the claimant will have to repay the overpaid benefits.

DECISION:

The agency representative's October 1, 2013, 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 is overpaid \$2,010.00 in benefits for the period of August 25, 2013 through November 2, 2013. The employer's account will not be charged for benefits paid for the period on or after the entry date of this decision.

This matter is **remanded** to the Claims Division for determination of whether the employer participated in the fact-finding interview, whether the employer's account may be relieved of liability for benefits through November 2, 2013, and for determination of whether the claimant will have to repay the overpaid benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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