

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

GREGG R KINSLEY
Claimant

APPEAL NO. 19A-UI-00806-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

KLYN TIRE BATTERY INC
Employer

OC: 12/23/18
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 January 24, 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 deputy's conclusion that the claimant was discharged on December 17, 2018 for no disqualifying reason. After due notice was issued, a hearing was held on February 12, 2019. Claimant Gregg Kinsley participated. Jay Klyn represented the employer and presented additional testimony through Kathy Klyn, Samantha Wilson, Crissy Cain, and Cody Aistrope. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 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 claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid 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: Jay Klyn and his father own and operate four Subway restaurants, including a restaurant in Glenwood. The Glenwood Subway's hours of operation are 7:00 a.m. to 11:00 p.m. on Monday through Friday, 8:00 a.m. to 11:00 p.m. on Saturday, and 9:00 a.m. to 11:00 p.m. on Sunday. The Klyns own another business, Klyn Tire Battery, Inc. and use that business name for their employer account with Iowa Workforce Development. Jay Klyn's spouse, Kathy Klyn, lacks an official title, but assists as needed with business operations and has supervisory authority, including supervisor authority over the Subway restaurant managers.

Gregg Kinsley was employed as the full-time, salaried manager at the Glenwood Subway from 1999 until December 17, 2018, when Jay Klyn discharged him from the employment. Mr. Klyn was Mr. Kinsley's immediate supervisor. Mr. Kinsley was the only full-time employee at the Glenwood restaurant. Mr. Kinsley and Mr. Klyn had a mutual understanding and agreement that Mr. Kinsley would work 42 to 45 hours per week, that his scheduled work hours would conform to business needs, and that he would remain available outside those scheduled hours as necessary. The employer paid for Mr. Kinsley's cell phone service so that store employees and the Klyns could reach Mr. Kinsley as needed. Mr. Kinsley and the employer had a mutual understanding and agreement that Mr. Kinsley would secure a substitute worker for any uncovered shifts and would work uncovered shifts as necessary. Mr. Kinsley generally worked day-shift hours, 8:00 a.m. to 4:30 p.m. or 6:00 a.m., to 2:00 p.m. Monday through Friday. Mr. Kinsley would go to the restaurant and to the bank on Saturday mornings to ensure the restaurant had sufficient change to make it through the weekend, but otherwise did not generally work on the weekend. Mr. Kinsley's duties included, first and foremost, providing customer service. Mr. Kinsley's duties also included supervising 10 to 12 part-time employees, preparing or assisting with preparing the work schedule, making certain the restaurant was at all times appropriately staffed, and being available to address employee questions and concerns, whether he was at the restaurant or away from the restaurant. Mr. Kinsley's duties also included weekly inventory, weekly ordering, bookkeeping, and banking.

The final events that that triggered the discharge played out over the course of December 14 and 15, 2018, Friday and Saturday. On December 14, Mr. Kinsley worked from 8:00 a.m. to 4:00 p.m. On that day, one of the Glenwood Subway employees notified Mr. Kinsley that she needed to be absent from her 5:00 p.m. to 11:00 p.m. shift on December 15 due to illness. Mr. Kinsley did not take any steps to fill the uncovered shift. On December 14, Mr. Kinsley had a sore ankle that did not require medical attention. A couple days earlier, someone had accidentally stepped on Mr. Kinsley's foot while he was working at the Glenwood Subway and Mr. Kinsley suffered a twisted ankle. Mr. Kinsley did contact a nurse regarding his sore ankle and was advised to elevate his foot, to use heat and ice to address the soreness, and to take Tylenol PM as needed to sleep at night. At 7:26 a.m. on December 15, Jay Klyn sent a text message to Samantha Wilson, an employee on duty at Glenwood Subway. Mr. Klyn's message included an instruction to have Mr. Kinsley call Mr. Klyn when Mr. Kinsley came to the restaurant that morning to take care of the banking. Mr. Klyn was aware of the uncovered December 15 evening shift and wanted to discuss that matter and others with Mr. Kinsley. When Mr. Kinsley arrived at the restaurant around 10:30 a.m., Ms. Wilson told Mr. Kinsley about Mr. Klyn's message and that Mr. Kinsley was supposed to call Mr. Klyn. Ms. Wilson and Mr. Kinsley discussed the need to cover the evening shift. During that discussion, Mr. Kinsley stated, "What does he want me to do, pull someone out of my ass?" While Mr. Kinsley was at the restaurant, Ms. Wilson also told Mr. Kinsley about a three-foot party sub order due for pick-up on Sunday, December 16. Party sub orders require use of special bread pans and weaving of the pre-measured dough loaves to make the longer loaf. Making party subs was something Mr. Kinsley would ordinarily handle. Mr. Kinsley made no provision for preparing the party sub. Before Mr. Kinsley left the restaurant at about 11:00 a.m., Ms. Wilson reminded him that he was supposed to call Mr. Klyn. Mr. Kinsley did not call Mr. Klyn.

Shortly after 11:00 a.m., Mr. Klyn sent a text message to Ms. Wilson asking whether Mr. Kinsley had been to the restaurant. Ms. Wilson reported to Mr. Klyn that Mr. Kinsley had been at the restaurant, that she had told him repeatedly that he needed to call Mr. Klyn, that Mr. Kinsley had ignored her, and that Mr. Kinsley had made no arrangement for the party sub. Mr. Klyn then took steps to cover the uncovered evening shift by having one employee work a portion of the shift and having the ill employee also report to the restaurant to work a portion of the shift.

At 6:20 p.m. on December 15, Kathy Klyn called Mr. Kinsley's cell phone, but Mr. Kinsley did not answer. Immediately thereafter, Ms. Klyn sent Mr. Kinsley a text message asking him what his plan was for the three-foot party sub. Mr. Kinsley was aware of the call and text message that evening, but elected not to respond. When Mr. Kinsley did not respond, Ms. Klyn took steps that evening to make the party sub bread at the employer's Red Oak Subway so that it would be available to fill the customer's order the next day. On the morning of Sunday, December 16, Mr. Klyn delivered the party sub bread to the Glenwood store.

On Monday, December 17, Mr. Klyn notified Mr. Kinsley that he was discharged from the employment. Mr. Klyn did not question Mr. Kinsley regarding why he had not followed up on the staffing concern or the party sub order or why Mr. Kinsley had not responded to the employer's attempts to reach him.

In making the decision to discharge Mr. Kinsley from the employment, Mr. Klyn considered an uncovered evening employee shift from December 12. Mr. Kinsley had been aware of the uncovered shift when he left work that day, but did not take steps to fill it. Mr. Kinsley later told Mr. Klyn that he had tried to call Mr. Klyn, but Mr. Klyn had received no such call.

In making the decision to discharge Mr. Kinsley from the employment, Mr. Klyn considered an incident from Saturday, October 20, 2018, when Mr. Klyn had contacted Mr. Kinsley to have him report to the restaurant and help with an especially busy lunch rush. Kathy Klyn had also reported to the restaurant to help. Mr. Kinsley arrived at 11:00 a.m., but then left at 1:00 p.m. before the lunch rush was over. Ms. Klyn was busy serving customers and had an employee quickly retrieve Mr. Kinsley. Mr. Kinsley left the restaurant at 2:00 p.m. Ms. Klyn remained at the restaurant longer because the level of business necessitated the additional help.

Mr. Klyn did not issue any written reprimands to Mr. Kinsley prior to discharging him from the employment.

Mr. Kinsley established an original claim for benefits that was effective December 23, 2018. Mr. Kinsley received \$4,203.00 in unemployment insurance benefits for the nine weeks between December 23, 2018 and February 23, 2019. Klyn Tire Battery, Inc./Subway is the sole base period employer in connection with the claim.

On January 23, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Kinsley's separation from the employment. Jay Klyn represented the employer at the fact-finding interview.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The employer's decision to discharge Mr. Kinsley from the employment was based on two primary concerns. The employer was concerned about Mr. Kinsley's neglect of assigned duties and the impact of that negligence on the employer's operations. The employer was also concerned about Mr. Kinsley's failure to properly communicate with the employer regarding business needs. During the period of December 14 and 15, Mr. Kinsley elected to neglect his duty to take reasonable steps to cover the uncovered shift and elected to neglect his duty to make arrangements for the party sub. These matters were squarely within Mr. Kinsley's established duties. Mr. Kinsley's neglect of these duties shifted the burden onto Mr. Klyn, Ms. Klyn, and two employees, including the ill employee. The weight of the evidence establishes a similar neglect of duties on December 12, when Mr. Kinsley failed to take reasonable and appropriate steps to cover a shift. The weight of the evidence establishes that Mr. Kinsley knowingly, intentionally, and unreasonably disregarded Mr. Klyn's reasonable directive to call Mr. Klyn on the morning of December 15. The weight of the evidence also establishes that Mr. Kinsley knowingly, intentionally, and unreasonably disregarded Ms. Klyn's attempts to reach him on the evening of December 15. Mr. Kinsley's assertion that he was unable to respond to the employer's concerns because his ankle hurt and/or that he was under the influence of Tylenol PM is not credible. The weight of the evidence establishes a notable, but less serious neglect of duties on October 20, 2018. The pattern of conduct is sufficient to establish an intentional and substantial disregard of the employer's interests. Accordingly, Mr. Kinsley 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. Kinsley 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 for 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 base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Kinsley received \$4,203.00 in unemployment insurance benefits for the nine weeks between December 23, 2018 and February 23, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Kinsley received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Kinsley is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The January 24, 2019, reference 01, decision is reversed. The claimant was discharged on December 17, 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 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$4,203.00 in unemployment insurance benefits for the nine weeks between December 23, 2018 and February 23, 2019. The claimant must repay the overpaid benefits. 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/rvs