

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICK E HEINRICH
Claimant

APPEAL NO. 13A-UI-03157-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE SHERWIN-WILLIAMS CO
Employer

OC: 02/10/13
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 11, 2013, reference 01 decision that allowed benefits. After due notice was issued, a hearing was held on April 15, 2013. Claimant Nick Heinrich did not respond to carry notice instructions to provide a telephone number for the hearing and did not participate. Cathy Catino represented the employer and presented additional testimony through Jeff Wohlberg. Exhibits One through Seven were received into evidence.

ISSUES:

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

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nick Heinrich was employed by the Sherwin-Williams Company as a full-time store manager until February 15, 2013, when Jeff Wohlberg, District Manager, and Cathy Catino, Area Human Resources Manager, discharged him from the employment. Mr. Heinrich had been the Muscatine Store Manager since 2008. Mr. Heinrich had been with the company since 2006. Mr. Wohlberg was Mr. Heinrich's immediate supervisor.

On January 22, 2013, Brady Manriquez, Assistant Manager at the Muscatine store notified Cathy Catino, Area Human Resources Manager, of several concerns regarding Mr. Heinrich. Those concerns included Mr. Heinrich taking store money and using it to buy his breakfast. Mr. Manriquez alleged that Mr. Heinrich falsified his time and attendance records to indicate that he was working at times when he was engaged in personal shopping or errands. Mr. Manriquez alleged that Mr. Heinrich had intentionally overbilled or double billed customers. Mr. Manriquez alleged that Mr. Heinrich had used store funds to pay for a speeding ticket he had incurred while operating employer's van during work hours. Mr. Manriquez alleged that Mr. Heinrich was living

at the store after store hours. Mr. Manriquez alleged that Mr. Heinrich failed to accurately document his sales calls by claiming to have been visiting a customer when he was instead running personal errands, tanning, shopping or engaged in some other non-work-related activity.

On January 22, 2013, Ms. Catino forwarded Mr. Manriquez's concerns to Stephanie Monahan, Loss Prevention Specialist. Ms. Monahan began her investigation of the matter on or about February 7, 2013. This was 16 days after Mr. Manriquez's report to Ms. Catino. Ms. Monahan is the employer's only Loss Prevention Specialist assigned to the employer's "Midwestern Division," which includes Michigan, Ohio, Illinois, Wisconsin, Iowa, Nebraska, North Dakota, South Dakota, Wyoming, Oregon, and Washington. In connection with her investigation of the matter, Ms. Monahan began by researching the time and attendance records, which revealed that Mr. Heinrich had entered an unusually high number of system overrides when documenting his time. Ms. Monahan then contacted the District Credit Office and verified that Mr. Heinrich had indeed double billed and overbilled clients. At some point, Ms. Monahan interviewed Mr. Manriquez by telephone. On February 13, Ms. Monahan provided a report to Ms. Catino. Finally, on February 14, 2013, Ms. Monahan interviewed Mr. Heinrich. Mr. Heinrich provided a four-page written statement in which he admitted to all of the allegations Mr. Manriquez had brought to the employer's attention on January 22, 2013. Each of the actions involved were a violation of company policy. Mr. Heinrich was aware of the company policies and was responsible for enforcing those policies at the Muscatine store. Mr. Heinrich had continued to perform his duties from the time of Mr. Manriquez's complaint to the time he was interviewed by Ms. Monahan. The employer had not mentioned the matters to Mr. Heinrich prior to February 13, 2013.

On February 14, 2013, Mr. Wohlberg met with Mr. Heinrich and discharged him from the employment. Mr. Wohlberg delivered to Mr. Heinrich a termination letter that set forth the various violations and the policies violated.

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 misconduct in connection with the employment based on intentional violation of multiple company policies. These included misappropriating the employer's revenue and converting it to personal use. The misconduct included false documentation in connection with the misappropriation of funds and in connection with time keeping for payroll purposes. The misconduct included overbilling and double billing clients. The misconduct included violating the law by getting a speeding ticket in the employer's van. The misconduct included use of the employer's place of business as a personal residence. Any one of these individually is enough to establish misconduct in connection with the employment.

The remaining issue is whether the discharge was based on a current act. All of the allegations came to the employer's attention on January 22. The investigation did not *start* until on or about February 7. That was 16 days, more than two weeks after several serious allegations were brought to the employer's attention. The evidence indicates that Ms. Monahan did indeed have a vast, multi-state region for which she was responsible as Loss Prevention Specialist. However, the employer presented no testimony from Ms. Monahan regarding what, if anything, prevented her from commencing her investigation prior to February 7, 2013. The employer had the ability to present testimony through Ms. Monahan. The employer witnesses were unable to say what, specifically, prevented Ms. Monahan from addressing in a more timely manner the concerns that came to the employer's attention on January 22, 2013. The employer waited 23 days from time the allegations came to light to the date the employer spoke with Mr. Heinrich

about those allegations. Mr. Heinrich had continued to report for work and was available to the employer. The administrative law judge concludes that the employer unreasonably delayed commencing its investigation and that the discharge was not based on a current act.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Heinrich was discharged for no disqualifying reason. Accordingly, Mr. Heinrich is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Heinrich.

DECISION:

The Agency representative's March 11, 2013, reference 01, decision is affirmed. The discharge was not based on a current act. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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