

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LORI L ERNST
Claimant

APPEAL NO. 13A-UI-08194-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BIRDNOW ENTERPRISES INC
BIRDNOW MOTOR TRADE
Employer

OC: 06/16/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Recovery of Overpayment of Benefits, Employer participation at Fact Finding

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated July 3, 2013, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 19, 2013. Claimant participated personally. Employer participated by Justin Birdnow, COO and Justin Hendrickson, Finance and Sales Manager.

ISSUES:

The issues in this matter are whether claimant was discharged for misconduct, is overpaid unemployment insurance benefits and whether employer's account is charged for non-participation at fact finding.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for the employer June 14, 2013.

Employer discharged claimant on June 14, 2013 because claimant tried to double dip on a commission plan. Employer pays \$100.00 for selling an environmental package. Claimant asked for the cash bonus plus a commission. This is a double payment in violation of employer's policy. Employer had discussed this very issue at a meeting just 30 days prior. Employer had issued claimant four prior warnings for policy violations. Employer issued claimant a final warning for work performance.

Employer participated at fact finding.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The administrative law judge holds that the evidence has established that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning pay manipulation. Claimant was warned concerning other policy violations.

The last incident, which brought about the discharge constitutes misconduct because claimant tried to take a double commission payment on a sale. This is an intentional policy violation in violation of a known company rule. Therefore, claimant was discharged for an act of misconduct and as such, is disqualified for the receipt of unemployment insurance benefits.

The next issue concerns an overpayment of unemployment insurance benefits.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied 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 matter of deciding the amount of the overpayment and whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Agency.

This matter is remanded to Claims Section for determination of an overpayment. Employer's account shall not be charged because they participated at fact finding.

DECISION:

The decision of the representative dated July 3, 2013, reference 01, is reversed and remanded. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the Claims Section for determination of an overpayment. Employer's account shall not be charged as employer participated at fact finding.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/css