

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSE C RICHMOND
Claimant

APPEAL NO: 11A-UI-05258-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SPHERION STAFFING LLC
Employer

**OC: 01/30/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Spherion Staffing, L.L.C. (employer) appealed a representative's April 11, 2011 decision (reference 01) that concluded Jesse C. Richmond (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 16, 2011. The claimant participated in the hearing. Kelly Harris appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer on March 1, 2010; his initial assignment continued through September 20, 2010. His second and final assignment began on September 23, 2010. He worked part time doing assembly with the employer's Cedar Rapids, Iowa business client. His last day on the assignment was September 29, 2010. The assignment and the employment ended as of that date because the business client and the employer determined to end the relationship after a background check revealed two misdemeanor convictions for theft in 2005, as well as additional misdemeanor convictions.

When the claimant had applied for work with the employer, he had completed an application which asked if he had ever been convicted of a crime including misdemeanors. He answered, "Yes." The form then indicated that the claimant should "explain below." The claimant wrote two things on the space provided, "public intoxication, disorderly conduct."

At the time the claimant was completing the form, the employer's representative who was working with him was reviewing the public record documents regarding the claimant's misdemeanor convictions. From about 2001 through 2008 there were about 13 listed on line,

including the two 2005 theft convictions, and the representative commented to the claimant that she did not see anything so serious as would prevent him from placement. As she already knew the overall history, the claimant did not feel it necessary to detail out the history on the application form. He was then placed into and completed the assignment from March 1 through September 20.

After the claimant was placed in his second assignment, pursuant to the placement specifications of that business client a more in depth background check was run. That check revealed three additional misdemeanor convictions in the same 2001 through 2008 period, none of which were additional theft convictions. The business client's standards were not to accept placement of persons with even misdemeanor convictions for theft, so the claimant was dropped from the assignment. As the employer determined that the claimant's record was too extensive, it determined not to seek to place him in any further assignments.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is essentially falsification of his job application. The employer has not established that the claimant falsified the application. He truthfully answered "yes," and while he did not give an extensive written list, the form does not clearly require such; also, the employer's representative was already aware of the vast majority of the convictions.

Further, even if there had been a "falsification," the false statement must endanger the health, safety or morals of the applicant or others or result in exposing the employer to legal liabilities or

penalties or result in placing the employer in jeopardy. The employer has not established a clear liability or jeopardy to the employer. In addition, the court has ruled that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Although the court did not define materiality, it cited Independent School District v. Hanson, 412 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Here the claimant was indeed hired despite the employer's representative's knowledge that the claimant had extensive misdemeanor convictions including two in 2005 for theft. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's April 11, 2011 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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