

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BRANDON R TUCKER
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PO BOX 502
WILTON IA 52778-0502

MIKE MCMURRIN TRUCKING INC
D/B/A MCMURRIN TRUCKING
1625 SOUTHVIEW DR NW
PO BOX 8584
CEDAR RAPIDS IA 52408-8584

Appeal Number: 05A-UI-08013-RT
OC: 07-10-05 R: 04
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96-5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Mike McMurrin Trucking Company, Inc., doing business as McMurrin Trucking, filed a timely appeal from unemployment insurance decision dated August 2, 2005, reference 01, allowing an unemployment insurance benefits to the claimant, Brandon R. Tucker. After due notice was issued, a telephone hearing was held on August 22, 2005, with the claimant participating. Bruce Clark was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time truck driver from April 29, 2005 until he was discharged on July 11, 2005. The claimant was discharged for an accident he had on the day of his discharge, July 11, 2005. At that time the claimant was operating a dump truck for the employer. The claimant was beginning to dump a load when the gearshift accidentally went into reverse causing the truck to go down over an embankment. This caused the hydraulic line and the emergency brake line to break. The claimant did not put the truck in reverse nor did he cause the accident intentionally. The claimant had no other major accidents. On July 9, 2005, the claimant forgot that a chain was hooked on his tailgate and he had to cut the chain. The claimant had no other accidents. The claimant never received any written warnings for his driving. The claimant did receive some verbal warnings about watching out for safety and the claimant attempted to do so. Concerning his attendance, the claimant had one absence for car trouble and he informed the employer of this absence. The claimant had no tardies. The claimant received no warnings for his attendance. Pursuant to his claim for unemployment insurance benefits filed effective July 10, 2005, the claimant has received unemployment insurance benefits in the amount \$620.00 as follows: \$155.00 per week for four weeks from benefit week ending July 16, 2005 to benefit week ending August 6, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant credibly testified, and the administrative law judge concludes, that he was discharged on July 11, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged due to disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct, and includes tardies and necessarily requires a consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6 (2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny.

The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The employer also did not provide sufficient evidence of absences on the part of the claimant that were not for reasonable cause or personal illness and not properly reported so as to establish excessive unexcused absenteeism and disqualifying misconduct.

The claimant credibly testified that he was discharged after an accident involving an employer's dump truck that the claimant was operating at the time. The claimant credibly testified that while attempting to dump a load the truck accidentally went into reverse and the claimant went down over an embankment breaking the hydraulic line and the emergency brake line. The claimant credibly testified that this was an accident and he did not do this intentionally. The claimant credibly testified that he had no other major accidents but on July 9, 2005, did forget that a chain was hooked on his tailgate and he had to cut the chain. The claimant had no other accidents. The claimant received no written warnings but did receive some verbal warnings about watching out for safety and he attempted to do so. On the record here, and in the absence of any evidence to the contrary, the administrative law judge is constrained to

conclude that the claimant's acts causing his discharge were not deliberate acts constituting a material breach of his duties nor do they evince a willful or wanton disregard of the employer's interest nor are they carelessness or negligence to such a degree of recurrence as to establish disqualifying misconduct. Rather, the administrative law judge concludes the claimant's acts were at most, ordinary negligence in isolated instances and not disqualifying misconduct.

Concerning attendance, the claimant credibly testified that he had only one absence for car trouble and he notified the employer. The claimant credibly testified that he had no tardies. The claimant further testified that he had no warnings for attendance. The administrative law judge is constrained to conclude that this absence was for reasonable cause and properly reported, and not excessive unexcused absenteeism and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$620.00 since separating from the employer herein on or about July 11, 2005 and filing for such benefits effective July 10, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of August 2, 2005, reference 01, is affirmed. The claimant, Brandon R. Tucker, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

dsb/pjs