

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KOYNE OSTERBUHR
Claimant

APPEAL NO: 10A-UI-07214-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SABRE COMMUNICATIONS CORP
Employer

OC: 04/11/10
Claimant: Respondent (2/R)

Iowa Code section 96.5(2)(a) - Discharge for Misconduct
Iowa Code section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Sabre Communications Corporation (employer) appealed an unemployment insurance decision dated May 5, 2010, reference 01, which held that Koyne Osterbuhr (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 22, 2010. The claimant participated in the hearing with Sydney Twohig. The employer participated through Paula Peterson, Human Resources Director; Todd Jasa, Foreman; Erin Baird, Human Resources Generalist; and Attorney Kenneth Wentz. Employer's Exhibits One through Seven and Claimant's Exhibits A and B were admitted 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:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time welder from July 2, 2001 through April 14, 2010 when he was discharged for violation of company policy. He had a long history of disciplinary action beginning on October 12, 2004 when he received a written warning for creating an unsanitary work area by "blowing his nose on the floor." A verbal warning was issued on September 11, 2006 and a written warning on September 12, 2006 for excessive absenteeism. Another verbal warning was issued on November 29, 2006 for not wearing the proper safety equipment. A first written warning was issued on April 30, 2007 for a no-call/no-show when he failed to call in to report his absence a half hour before his shift.

The claimant was suspended for three days without pay for insubordination and abusive language. The warning specifically stated that any further incidents in the future may result in additional disciplinary action, up to and including, termination. He was upset because he received the written warning for the no-call/no-show and he said the employer makes the rules

as it goes along and he told the employer to quit running the place like kindergarten. He told his supervisor, Tom Jasa, that he did not know he was required to call in a half hour before his shift and Mr. Jasa reminded him of the meeting where it was discussed. The claimant responded, "Well why don't I get a fucking verbal warning first." Mr. Jasa again explained that he had been given paperwork advising him of the rules and the claimant said, "It was fucking bullshit" and that he threw the papers he got from the meeting in the "fucking trash can where they fucking belong." He said one more that time, this fucking place was bullshit.

Verbal warnings were issued to him on April 10, 2008 for intentionally restricting output and on July 17, 2008 for inappropriate dress attire. Additional verbal warnings were issued to him on March 2, 2009 for leaving early for break and on October 28, 2009 for returning late from break. One more verbal warning was issued to him on February 25, 2010 for smoking in an unauthorized area. All of these disciplinary warnings were signed by the claimant.

Both the claimant and co-employee Joe Heib were suspended for three days on March 26, 2010. As the claimant was leaving work in his vehicle on March 25, 2010, Mr. Heib opened the door to the claimant's vehicle. The claimant told him he would, "kill the mother fucker if he touched his truck again!" Mr. Heib was suspended for horseplay and the claimant was suspended for threatening Mr. Heib. The claimant's actions were a violation of Company Policy D-4, Work Rules & Discipline, Rule 10 which includes threatening, intimidating or interfering with fellow employees at any time. The warning specifically stated that further incidents would be grounds for immediate termination.

The final incident that prompted the claimant's termination occurred on April 14, 2010 when a co-worker heard the claimant state, "Tell that mother-fucking nigger to turn his radio down!" Aaron Kates is an African American and this is the person to whom the claimant was referring. This was not only a repeated violation of D-4, Rule 10 but it was also a violation of the employer's D-2, Harassment Prevention Policy. Co-employee Phongphanh Kethvongsa (Phong) heard what the claimant said and he told Joe Heib and Larry Riley what the claimant said. They advised Phong to tell the employer but he refused so Mr. Heib told Supervisor Jasa what the claimant had said. Mr. Jasa questioned Mr. Riley and he stated that he saw the claimant walk down to Aaron's area and told him to turn down his radio. The claimant then turned away and said, "stupid mother fucker." A short while later Phong approached him and Mr. Heib and said that the claimant told him to tell the "nigger" to turn down his radio. Mr. Jasa questioned Phong and Phong said that Larry was lying but Mr. Jasa thought Phong was trying to hide something or did not want to get involved.

Mr. Jasa reported the incident to Paula Peterson of Human Resources and she directed him to question the claimant about it. Mr. Jasa asked the claimant about it and he admitted to Mr. Jasa that he did call him a nigger and a mother fucker because he was "pissed off" about Aaron's radio being so loud. He further stated that he has a bad habit of blurting things out before thinking about it. Ms. Peterson interviewed the claimant with Mr. Jasa and Manager Harry Foote and she asked him if he knew why they were meeting. The claimant responded that he supposed it was because Mr. Heib and Mr. Riley were trying to get him into trouble. He told Ms. Peterson to talk to Aaron Kates because "he came up to me and apologized for getting me in trouble. If he is okay, why aren't you?" Ms. Peterson told the claimant that Mr. Kates did not get him in trouble but that he was overheard saying something like, "Tell that mother fucking nigger to turn his music down." She asked if he said that and the claimant responded in front of these witnesses, "I do use the N word. I use it all the time. I know I shouldn't but things slip out. I also use the bad language. Paula everyone uses it out there. I don't know why I'm getting in

trouble over it. I didn't call him that this morning, but I have used it, probably too often, in the past."

Ms. Peterson told the claimant that he admitted he said that to Mr. Jasa and asked if he was now denying that he said it. The claimant responded, "Aaron is okay with it. He even apologized for getting me in trouble. Let's go out to the floor and talk to Aaron. He'll tell you that he doesn't mind my language. If he's okay, this shouldn't be an issue." The claimant then told Ms. Jasa that he was lying and Mr. Jasa told the claimant he was very clear about asking him what happened. The claimant earlier said he called him a "nigger" and that he did not like his "jungle music". He blurted out to anyone who was nearby that he wished he would turn his mother fucking radio down. The claimant again told Mr. Jasa he was lying and said he now supposed he was going to lose his job. Ms. Peterson reminded him that he had just returned from a three-day suspension for threatening a co-worker's life. The claimant said, "This is all about Joe Hieb being out to get me. This guy is trying to get me in trouble." Ms. Peterson told him it was not about Joe and the claimant said, "I'm not listening to any more of this mother fucking talk!" He jumped up, slammed out of the human resources office, "spewing foul language about the company, Joe Hieb and Larry Riley."

The claimant filed a claim for unemployment insurance benefits effective April 11, 2010 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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 section 96.5-2-a.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for repeated violation of company property and for using threatening, offensive and harassing language. He believes he was discharged without cause but the preponderance of the evidence establishes a long pattern of inappropriate behavior. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated May 5, 2010, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs