

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HUGH M ORTNER
Claimant

APPEAL NO. 13A-UI-01980-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SLB OF IOWA LC
Employer

OC: 01/20/13
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, SLB of Iowa, filed an appeal from a decision dated February 18, 2013, reference 01. The decision allowed benefits to the claimant, Hugh Ortner. After due notice was issued, a hearing was held by telephone conference call on March 19, 2013. The claimant participated on his own behalf. The employer participated by Human Resources Generalist Tom Rivas and Operating Partner Mike Young.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Hugh Ortner was employed by SLB from October 4, 2007 until January 19, 2013 as a full-time baker. He had attended orientation and had been trained as a baker at the time of hire. The employer is very concerned about meeting food handling safety policies to avoid being penalized by the health inspectors and causing illness to its customers.

Mr. Ortner was given a written warning on December 14, 2012, for not wearing a hat as required. He was also subject of a “calibration” or audit that same day which demonstrated he was aware of other safety requirements. On January 11, 2013, he was given a final written warning for turning off a food freezer. The warning advised him his job was in jeopardy.

On January 18, 2013, he was doing prep work in the kitchen and was not using a food sanitizing solution. The food handling policies requires work surfaces and utensils to be cleansed when there is a product change or the work surface gets dirty. Mr. Ortner did not feel he had to use the solution because the food he was handling did not go onto the table and he did not have need of utensils. He was discharged by General Manager Jim Shepherd on January 19, 2013, after he had consulted with human resources.

Hugh Ortner has received unemployment benefits since filing a claim with an effective date of January 20, 2013.

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 claimant was discharged after a third violation of the safe food handling policies. He has maintained there is one set of rules for the baker and another set for the prep person but the administrative law judge does not find this convincing. Safe food handling practices apply to anyone handling food in a commercial establishment destined to be consumed by customers. From the prior warnings it is apparently the claimant was inclined to "cut corners" now and then but this is unacceptable. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of February 18, 2013, reference 01, is reversed. Hugh Ortnier is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css