

**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**

**EVON GRALAPP
15926 MESQUITE AVE
LE MARS IA 51031**

**HARKERS DISTRIBUTION INC
901 – 6TH ST SW
PO BOX 1308
LE MARS IA 51031**

**RICHARD STURGEON
PO BOX 3372
SIOUX CITY IA 51102**

**Appeal Number: 04A-UI-02703-SW
OC 02-08-04 R 03
Claimant: Respondent (2)**

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
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated March 3, 2004, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was mistakenly conducted on April 1, 2004, after the claimant had requested an in-person hearing on March 20, 2004. An in-person hearing was held on May 13, 2004, in Sioux City, Iowa. The claimant participated in the hearing with his representative, Richard Sturgeon. Marcia Rosacker participated in the hearing on behalf of the employer with witnesses, Glen Reichle and Matt Wankum. Exhibits One and A and B was received.

FINDINGS OF FACT:

The claimant worked for the employer as a warehouse worker from June 2, 1997, to January 29, 2004. His supervisor was Matt Wankum. The claimant had received a final written warning on December 10, 2003, for making negative comments about the employer and his job and sleeping during a department meeting on December 9. The claimant was informed and understood that under the employer's work rules, defacing company property was grounds for termination. On April 16 and 21, 2003, the claimant attended meetings in which employees were warned about writing or drawing on boxes in the plant.

On January 29, 2004, the claimant wrote the name of another employee on the lunchroom table using a permanent marker during the first break of the day. Coworkers at the table told the claimant that he would get into trouble if he did not clean off the table. The claimant said that he would clean off the table by the end of his shift. The claimant did not clean off the table until his supervisor told him to clean it up after the second break of the day. At that point, the claimant used a cleaning solvent to remove the permanent marker from the table. The lunchroom is considered a public area used by customers and family members.

On January 30, 2004, the claimant was discharged from employment based on his prior disciplinary record and for defacing company property on January 29.

The claimant filed a new claim for unemployment insurance benefits with an effective date of February 8, 2004. The claimant filed for and received a total of \$2,177.00 in unemployment insurance benefits for the weeks between February 8 and March 27, 2004.

A telephone hearing was mistakenly conducted on April 1, 2004, after the claimant had requested an in-person hearing on March 20, 2004. On April 2, 2004, the claimant's representative requested that the decision be vacated and an in-person hearing be scheduled as had been requested.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the hearing should be reopened because the claimant had requested an in-person hearing but a telephone hearing was mistakenly conducted. The unemployment insurance rules provide the hearing may be reopened and any decision be vacated upon a showing of good cause.871 IAC 26.8(3). The claimant has shown good cause to reopen this matter and to vacate any prior decision.

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance 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.

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).

The claimant's violation of a known work rule was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant, especially since the claimant had been informed specifically about defacing company property on more than one occasion in the past. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The next issue in this case is whether the claimant was overpaid unemployment insurance benefits.

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.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$2,177.00 in benefits.

DECISION:

The unemployment insurance decision dated March 3, 2004, reference 01, is reversed. Good cause for reopening this matter has been shown. Any prior decision in this matter is vacated. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$2,177.00, which must be repaid.

saw/kjf