

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEORGE L PASSARELLI
Claimant

APPEAL NO. 13A-UI-11054-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 09/01/13
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Recovery of Overpayment of Benefits, Employer participation at Fact Finding

STATEMENT OF THE CASE:

Tyson Fresh Meats (employer) appealed a representative's September 20, 2013, decision (reference 01) that concluded George Passarelli (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 22, 2013. The claimant participated personally. The employer participated by Kristi Fox, Human Resources Clerk.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason and whether he was overpaid unemployment insurance benefits.

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 hired on September 28, 2009, as a full-time production worker. The claimant signed for receipt of the employer's handbook on September 28, 2009. The employer issued the claimant a written warning on August 20, 2013, for code of conduct violations. The claimant had three code of conduct violations. He perceived inequities in the work environment, became enraged, and his conduct was not exemplary.

On August 28, 2013, the claimant was driving a type of forklift called a mule. There were allegations that his driving was erratic and he was asked to go to the human resources office to answer questions. He became enraged and started yelling. He said things like "Fuck off, mother fuckers". The employer suspended the claimant on August 28, 2013. The claimant returned on August 30, 2013, and the employer terminated him for his conduct on August 28, 2013.

The claimant filed for unemployment insurance benefits with an effective date of September 1, 2013. He received \$2,658.00 in benefits after the separation from employment. The employer participated personally at the fact-finding interview on September 19, 2013, by Kristi Fox.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The claimant clearly disregarded the standards of behavior which an employer has a right to expect of its employees. The claimant's actions were volitional. He became enraged and his conduct was not in the best interests of the employer. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, the claimant's actions are misconduct. The claimant was discharged for misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the

employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant has received unemployment insurance benefits that he was not entitled to receive. The employer participated personally in the fact-finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

DECISION:

The representative's September 20, 2013, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant has received unemployment insurance benefits that he was not entitled to receive. The employer participated personally in the fact-finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs