

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN ROSS
Claimant

APPEAL NO: 09A-UI-14103-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DENVER FINDLEY & SON INC
Employer

OC: 12/07/08
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Denver Findley & Son, Inc. (employer) appealed an unemployment insurance decision dated September 10, 2009, reference 07, which held that Kevin Ross (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 January 4, 2010. The claimant participated in the hearing with brother, Ken Ross. The employer participated through Owner Jack Findley; Glenda Warner Findley, Bookkeeper; Allen Saffell, Driver/Mechanic; Roger Gulling, Senior Driver; Brandon Stanton, Driver; and Attorney Richard Bartolomei. Employer's Exhibits One through Three and Claimant's Exhibits A, B, and C 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 part-time truck driver from July 24, 2007 through August 12, 2009. He was discharged for repeated negligence and his public statement that he would drive the employer's trucks any way he wanted if he had to pay for it. In the last several months of the claimant's employment, the employer had to have major repairs done on the truck the claimant was driving. The repairs were all due to rough driving and could have been prevented. He twisted off the drive shaft on March 12, 2009 which cost the employer a loss of business and the cost to repair the truck. He tore out the clutch on July 31, 2009 when he downshifted on a hard pull causing the clutch to shatter. The financial damages from the broken clutch were in the amount of \$1,695.98.

During the last 14 months of the claimant's employment, he broke the yoke on the driveshaft three times during his employment. This type of equipment on a dump truck does not typically break unless it is being abused. The U-joint connects the yoke and the driveshaft; it is a solid piece of steel about four and one-half inches across and capable of holding 100,000 pounds of torque. On August 12, 2009 the claimant tore out the U-joint when he was working on soft

ground and let out the clutch too fast, which caused the driveline to snap. He had just been instructed not to do that and did it anyway. After that incident, the senior driver told the claimant on the CB to hold it down and take it easy and the claimant responded over the radio, "If I'm going to have to pay for it, I'll drive the son-of-a-bitch any way I want to, even if I tear it up." Several other drivers heard the claimant's comment and reported it to the employer, who subsequently discharged the claimant. The employer assigned another driver to the claimant's truck on August 13, 2009 and when the driver got into the truck, he noticed the glass that covers the odometer on the dash had been broken and was missing. The claimant never reported any problems with it the day before and it was fine until he damaged it either after or before he was told he was fired.

The claimant filed a claim for unemployment insurance benefits effective December 7, 2008 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 § 96.5-2-a.

Iowa Code § 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 on August 12, 2009 for

repeated negligence and his public statement that he was going to drive the employer's truck any way he wanted, whether or not it tore up the truck. The claimant denies all wrongdoing but his claim of innocence does not ring true. The preponderance of the evidence confirms he was rough with the employer's vehicle and the fact that he broadcasted his intent to possibly be rougher with the truck was the last straw. Willful misconduct can be established where an employee manifests an intent to disobey a future reasonable instruction of his employer. Myers v. IDJS, 373 N.W.2d 507 (Iowa 1983). Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 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 § 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 September 10, 2009, reference 07, 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 Division for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css