

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEREMIE J COOKSEY
Claimant

APPEAL NO. 10A-UI-15343-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

OC: 10-03-10
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 26, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 20, 2010. The claimant did participate and was represented by Phillip Miller, Attorney at Law. The employer did participate through Katie Holcomb, Human Resources Manager and was represented by Steven Nadel, Attorney at Law. Employer's Exhibit's One through Ten were entered and received into the record. Claimant's Exhibits One through Seven were entered and received into the record.

ISSUES:

Was the claimant discharged due to job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a maintenance mechanic full time beginning January 31, 2006 through October 4, 2010 when he was discharged.

As part of his therapy for a work-related injury, the claimant was to take pool therapy on Monday, Wednesday and Fridays. His treating physician did not require that the claimant perform his pool therapy at any particular time. Since the pool therapy was done on his own at a local hotel, the claimant did not have to work around the schedule of anyone else, like a physical or occupational therapist. There was no agreement between the claimant's attorney and the employer's attorney that the claimant could take his pool therapy whenever he wished or at his own convenience.

On September 30 the claimant was specifically told that he would not be allowed to go to pool therapy at 10:00 a.m. but was instead to go at 2:15 p.m. On October 1 the claimant violated

that instruction and went to pool therapy at 10:00 a.m. The morning of October 4 the claimant was again specifically instructed that he was not to take his pool therapy at 10:00 a.m. but was to do it at 2:15 p.m. After that meeting on October 4 the claimant left his work station at 10:00 a.m. to go to pool therapy. If the claimant wanted to take his pool therapy at a particular time he had options he could have pursued to make that happen including pursuing an alternate medical care petition before the Iowa Workers' Compensation Commissioner or just simply asking his medical provider to specify the time for therapy. The claimant was specifically told that if he disregarded the employer's instructions he was placing his job in jeopardy.

When the claimant returned to the plant he was told that he was suspended for leaving without permission when he had been told not to do so. The employer repeatedly tried to contact the claimant after he was suspended to discuss the situation but the claimant simply refused to communicate with them. The claimant was discharged for failing to follow the employer's instructions about when to go to pool therapy.

The claimant has received unemployment benefits after the separation on a claim with an effective date of October 3, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all the circumstances and the employee's reason for noncompliance. Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985). The employer has the right to allocate its personnel in accordance with its needs and available resources. The claimant violated the employer's explicit instruction about when he was to take his pool therapy. The employer's direction was reasonable, clear and understood by the claimant. The claimant failed to pursue other options to change his pool therapy time. Generally, continued refusal to follow reasonable instructions constitutes misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has established misconduct sufficient to disqualify the claimant from receipt of unemployment insurance benefits.

The administrative law judge is not persuaded that the employer was retaliating against the claimant for filing a workers' compensation claim. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The October 26, 2010 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs