

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADRIAN D NUGENT
Claimant

APPEAL NO. 12A-UI-04084-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOEHL MILLWORK INC
Employer

OC: 03/04/12
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(8) – Current Act of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated April 5, 2012, reference 01, that held the claimant was not discharged for misconduct on February 23, 2012, and which allowed benefits. A hearing was held on May 3, 2012. The claimant participated. Alicia Clark, HR specialist; Almir Kavavic, shop manager; and Justin Douds, operations manager, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant was re-hired as a full-time shop employee on August 15, 2010 after he had abandoned his job in July due to an incarceration. He last worked on February 20, 2012. The claimant received the employer's attendance policy in a company-provided manual and the tobacco-free workplace policy. The latter has a strict prohibition against the use of tobacco on company time/property and it states a violation may result in discipline up to employment termination.

The employer issued a written warning to claimant on February 17, 2012 for attendance issues. He had six absences during a period from February 6, which included a no-call, no show to work on February 7. He was warned that the next absence without a report would result in termination.

On February 20, 2012, employees observed claimant lighting a cigarette while in his truck on company property. The employer discharged claimant on February 23 for this policy violation in light of the prior discipline.

Claimant has received unemployment benefits on his current claim.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge concludes that the employer has established misconduct in the discharge of the claimant on February 23, 2012, for repeated violation of company policy.

The employer gave claimant a second chance when it re-hired him after job abandonment due to an incarceration.

The employer had recently warned claimant about his attendance, which included a no-call, no-show to work, that put him on notice he could be terminated for a future offense. The employer has a tobacco-free workplace policy that strictly prohibits the smoking or use of tobacco products on company time/property. Claimant's violation of the tobacco use policy is grounds for termination and, in light of the recent attendance warning, constitutes job-disqualifying misconduct.

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.

Since this decision denies claimant benefits after he has received them, the overpayment issue is remanded to Claims for a decision.

DECISION:

The decision of the representative dated April 5, 2012, reference 01, is reversed. The claimant was discharged for misconduct in connection with employment on February 23, 2012. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw