

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THEODORE PHIPPS

Claimant

APPEAL NO: 12A-UI-15072-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ANNETT HOLDINGS INC
TMC TRANSPORTATION INC**
Employer

**OC: 11/04/12
Claimant: Respondent (2/R)**

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

STATEMENT OF THE CASE:

TMC Transportation, Inc. (employer) appealed an unemployment insurance decision dated December 13, 2012, reference 01, which held that Theodore Phipps (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 28, 2013. The claimant participated in the hearing. The employer participated through Todd Bunting, Vice-President of Safety and Chad Reece; Fleet Manager of the Specialized Division; Tom Kuiper, Employer Representative. Employer's Exhibits One through Three 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 claimant was discharged for misconduct sufficient to warrant a denial of unemployment 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 employed as a full-time shag driver moving equipment around the Ankeny John Deere facility from October 25, 1999 through October 8, 2012. The employer has a zero tolerance policy for all drivers with respect to any drug or alcohol use, charges on personal time or while on duty, as well as in a personal vehicle or a commercial vehicle. A refusal to submit to a drug or alcohol test is grounds for termination. The claimant was discharged for reporting to work under the influence of alcohol on October 6, 2012 and for refusing to take a breathalyzer.

The claimant had slurred speech when he arrived at work and hit a pole with the front tire of his truck while attempting to back a trailer in the truck dock. Co-employee Dave Weiss observed this and reported it to Katherine Haubrich who observed the claimant "not acting like himself" when she arrived at work. The claimant told Ms. Haubrich to leave since it was not her

Saturday to work. He then pulled a trailer out of the dock but drove very slowly. Ms. Haubrich climbed up on the side of his truck and asked him if he was okay. The claimant leaned back into the side of his truck and said he was fine but his eyes were red and glossed over. Ms. Haubrich asked him several times and he was adamant that he was okay but he subsequently proceeded to park the trailer and hit another TMC trailer. Ms. Haubrich went into the office and called Chad Reece, who informed Todd Bunting. She returned outside after that and the claimant hit a third trailer with another loaded TMC trailer.

Ms. Haubrich told the claimant to stop immediately, to shut off his truck and to go into her office. He initially refused but then complied and walked towards the office with her. While walking, the claimant became irate and wanted to leave but Ms. Haubrich refused to let him leave. The claimant saw Mr. Reece and Mr. Bunting arrive with the breathalyzer tool. Mr. Bunting asked the claimant to go inside but he refused and began yelling and swearing. The claimant refused to take a breath test and said, "There is no need to take the test I am drunk." Mr. Bunting reported the claimant was agitated and slurring his speech. He continued to argue about a million mile ring and became more agitated when Mr. Bunting refused to discuss it further.

The claimant caused a bad scene on the John Deere property and was asked to leave. He refused to allow Mr. Bunting to walk him outside the gate, he refused to ride in his own truck and refused to walk out by himself but eventually agreed to walk out with Mr. Reece. The employer was asked to ensure the claimant left the property and the John Deere staff moved his truck outside the gate. It was parked but the keys were held until the claimant could have someone pick it up. After he was outside the gate, Mr. Bunting picked up Mr. Reece and the claimant asked if he was terminated and was advised he was.

The claimant filed a claim for unemployment insurance benefits effective November 4, 2012 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 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 to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on October 8, 2012 for reporting to work under the influence of alcohol and refusing to take a breathalyzer test. Although the claimant denies the allegations, the preponderance of the evidence confirms he did report to work under the influence of alcohol on October 6, 2012 and did refuse a breathalyzer test. The claimant's conduct shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. 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 December 13, 2012, reference 01, 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 Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs