

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

DENNIS DAVITT
2305 E 19TH ST N TRLR 19F
NEWTON IA 50208-9702

CONSTRUCTION PRODUCTS INC
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-06837-BT
OC: 05/21/06 R: 02
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96 5-2-a – Discharge for Misconduct
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Construction Products, Inc. (employer) appealed an unemployment insurance decision dated June 23, 2006, reference 03, which held that Dennis Davitt (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 July 25, 2006. The claimant participated in the hearing. The employer participated through Doug Uhlenhopp, Safety & Human Resources Manager; Lucas Gray, Human Resources Administrator; and Supervisors Doug Stefani, Larry Jones and Dave Anderson. Employer's Exhibits One through Three were admitted into evidence.

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 material handler from July, 18, 2005 through May 23, 2006, when he was discharged per the employer's progressive disciplinary policy. Employees are discharged upon receipt of four written warnings within a 12-month period and the claimant was aware of this policy. His first written warning was issued on December 7, 2005 for leaving the premises for lunch without clocking out as required. A second written warning was issued on January 10, 2006 for excessive absenteeism. He had ten absences since October 5, 2005 which resulted in over seven attendance points. A certified written warning for attendance was issued on February 8, 2006 and he was advised if he received one more written warning, he would be discharged.

The final incident occurred on May 20, 2006 when the claimant was issued a warning for violating rule 14, which is misuse of company time. He spent over 40 minutes in the bathroom instead of working. When one of his supervisors went in to use the restroom, he observed that someone was in one of the stalls. He heard no noise the entire time he was in the restroom and noticed when he was washing his hands, that the individual's feet were on the side of the toilet in the stall, as if the individual was leaning back against the opposite concrete wall while sitting sideways on the toilet. The supervisor notified a second supervisor who went into the restroom, heard no noise and also saw the individual's feet on the side of the toilet. It was determined the individual was the claimant and the two supervisors waited for the claimant to exit the restroom, which did not occur for another 35 to 40 minutes.

The claimant filed a claim for unemployment insurance benefits effective May 21, 2006 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 section 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 for receiving four disciplinary warnings within a one-year period. He admits receiving the first three warnings but contends the final warning was unwarranted since he was in the bathroom for 40 minutes because he was sick. Two witnesses heard no movement and no sound when the claimant was in the restroom and both reported seeing the claimant's feet on the side of the toilet. The claimant provided several explanations as to what was seen but it does not change the facts as observed by two witnesses. The preponderance of the evidence confirms he was not in the bathroom for 40 minutes due to illness on May 20, 2006 but because he was either sleeping or wasting time instead of working. The claimant's violation of known work rules was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated June 23, 2006, reference 03, 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 claimant is overpaid benefits in the amount of \$1,011.00.

sda/pjs