

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRETT R TIMMERMAN**  
Claimant

**APPEAL NO: 10A-UI-13609-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ZACHRY INDUSTRIAL INC**  
Employer

**OC: 08/29/10**  
**Claimant: Respondent (2-R)**

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

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated September 21, 2010, reference 01, that held the claimant was not discharged for misconduct on August 27, 2010, and benefits are allowed. A telephone hearing was held on November 1, 2010. The claimant did not participate. Jim Thorne, Foreman, Ken and Taylor Hendrix, Journeyman Insulators, Burk Whittington, Lead Insulator, and Oscar Lerma, Step-up Lead Insulator, participated for the employer. Employer Exhibit 1 was received as evidence.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid benefits.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on November 9, 2009, and last worked for the employer as a full-time insulator on August 27, 2010. The employer issued claimant employer policies that included a provision for zero tolerance regarding employee harassment.

The employer issued claimant written reprimands for absenteeism on March 25, 2010, and a safety issue on April 5. Employee Taylor Hendrix issued a near miss report to management on August 20 that involved claimant. The employer counseled the claimant about the safety issue.

After the counseling, claimant confronted Hendrix by calling him a fucking Narc. Hendrix and other employees submitted reports to management that confirmed what claimant said and how he acted. Hendrix stated it would be uncomfortable for him to continue working with claimant. The employer discharged claimant on August 27 for employee harassment in violation of its policy.

The claimant failed to respond to the hearing notice. The claimant has received benefits on his current unemployment 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.

The administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on August 27, 2010.

The employer established the standard of behavior by the issuance of the zero tolerance harassment policy. The claimant had received written reprimands so he was put on notice the employer would enforce its policy. Calling a co-worker a fucking Narc after a near miss report in front of other employees is a serious act of misconduct, and it disqualifies the claimant from receiving benefits.

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 the claimant has received benefits on his current claim, this issue is remanded to claims for an overpayment determination.

**DECISION:**

The department decision dated September 21, 2010, reference 01, is reversed. The claimant was discharged for misconduct on August 27, 2010. 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 the claimant is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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