

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHAWN E GRAHAM
Claimant

APPEAL NO. 07A-UI-07875-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED BARTON SECURITY SVCS LLC
Employer

**OC: 07/15/07 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Allied Barton Security Services, L.L.C. (employer) appealed a representative's August 6, 2007 decision (reference 01) that concluded Shawn E. Graham (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on September 6, 2007. The claimant participated in the hearing. Gerald Ramos appeared on the employer's behalf and presented testimony from one witness, Steven Reffitt. 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 1, 2006. He worked full time as a shift supervisor of the employer's contract security business at the employer's Des Moines, Iowa, business client. His last day of work was July 10, 2007. The employer discharged him on that date. The stated reason for the discharge was personal use of the employer's business client's telephone system for personal reasons.

The claimant had received the employer's policy, which prohibited the usage of a business clients' equipment, including telephone systems, for person reasons. On July 9 or July 10, the business client at which the claimant was stationed contacted Mr. Reffitt, the employer's site operations manager, and provided him with a copy of the business client's phone bill for the month of June. There were 16 non-business calls during times the claimant was on duty, ranging from 12 to 39 minutes, totaling 361 minutes, and averaging 22.56 minutes. When confronted, the claimant acknowledged that he had been making a significant number of calls at least in part because he was trying to keep his band together and thus was doing coordination and scheduling for the band. Further, the calls were at least in part occurring during times the

claimant should have been performing his duties, not break times. As a result of this phone usage, the claimant was discharged.

The claimant asserted that a prior site supervisor had told him on an occasion that it would be okay to use the phone to make a personal call. He also asserted that some subsequent site supervisors had entered the area when he was on personal calls and had not said anything to him.

The claimant established a claim for unemployment insurance benefits effective July 15, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,799.00.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

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 focus of the definition of misconduct is on acts or omissions by a claimant that “rise to the level of being deliberate, intentional or culpable.” Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer’s interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer’s interest, or
 2. The employee’s duties and obligations to the employer.

The claimant's personal phone usage against the employer’s policy 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. The claimant was aware of the employer’s policy; even if a site supervisor had excused a personal call on an occasion in the past and other site supervisors were aware that he was on a personal call on some other occasions, the claimant’s abuse of the policy to the extent that occurred in June cannot be excused; the claimant knew or should have known that his conduct was contrary to the employer’s policies and interests. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 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 representative’s August 6, 2007 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 10, 2007. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is

otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,799.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw