

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN WEATHERLY
Claimant

APPEAL NO. 11A-UI-06050-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ADVANCED AIR HEATING
AND AIR CONDITIONING**
Employer

OC: 04/03/11
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Advanced Air Heating and Air Conditioning (employer) appealed an unemployment insurance decision dated April 25, 2011, reference 01, which held that Brian Weatherly (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 26, 2011. The claimant participated in the hearing. The employer participated through Owners Ron and Heidi Hendrickson and Attorney Jim Dougherty. Employer's Exhibits One through Nine 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 having considered all of the evidence in the record, finds that: The claimant was employed from December 20, 2009 through March 30, 2011, when he was discharged for failure to complete the HVAC (heating, ventilation and air conditioning) apprenticeship program. He was hired as an HVAC helper and as a condition of employment he had to become EPA certified. The EPA certification is a federal requirement and all the employer's employees have to take and pass the EPA exam. The employer pays the initial cost of the materials for the EPA program test up front and advises employees they will have to pay for any tests thereafter if they do not pass the exam the first time. The initial cost of the test with the book was \$70.00 and it was \$55.00 thereafter.

The claimant took but did not pass the EPA test on three occasions: July 30, 2010; September 24, 2010; and December 31, 2010. The employer was instrumental in providing two additional tests on January 14, 2011 and February 11, 2011. The claimant made no attempts to

take the test in 2011, even though he had a final deadline of March 31, 2011 to pass it. Arrangements could be made to take the test at anytime.

The claimant expressed interest in joining the apprenticeship program and was admitted to the program beginning January 2011. The cost of the program was \$2,135.00, which included the apprenticeship program, the application, and the cost to log hours. The claimant chose to have the fees deducted from his paycheck, but he still had a remaining balance at the time of his separation. The apprenticeship program included classroom training in addition to weekly online course work. The classes were conducted by the Plumbing-Heating-Cooling Contractors Association and were held at Vatterott College. Attendance was mandatory in both the classroom work and online course work in order to successfully complete the program. The classes were held two weekends out of the month for five months.

The employer issued the claimant an employee performance review on January 15, 2011 advising him that his job was in jeopardy since he had not passed the EPA certification exam and had missed two and a half days of classes with PHCC. The claimant was advised that he could not miss any more work or classes between March 21, 2011 and June 30, 2011. He was further advised that he had to take and pass his EPA exam by March 31, 2011 as originally stipulated. If the claimant failed to comply with these terms, he would be demoted back to an HVAC helper at a rate of \$10.00 per hour or be terminated.

Owner Heidi Hendrickson received a call from the claimant on March 6, 2011 in which he said he had been arrested over the weekend and had a court date on Tuesday March 8, 2011. Since the employees were working out of town, the claimant would have missed the ride to the jobsite on Monday. The claimant said he would not be able to get a ride to the jobsite and could not drive there himself until he took care of his legal matters. Owner Ron Hendrickson drove the claimant to the jobsite after the claimant's court date on Tuesday. The claimant called Ms. Hendrickson on Sunday, March 20, 2011, and said that he would not be coming into work the next week because his girlfriend, who was pregnant, had been placed on bed rest. Ms. Hendrickson gave the claimant the week off work and told him to call her at the end of the week. The claimant called at the end of the week and said he needed to stay home another week and he was advised that he could not stay off work indefinitely.

The claimant asked Ms. Hendrickson on Sunday March 27, 2011 if he could collect unemployment and he was advised he could not, since work was available. The claimant asked if he could work that week then, since he needed the money, and the employer agreed. He was scheduled to report to work on March 28, 2011 at 6:30 a.m. but he was a no-call/no-show. The claimant did not report to work the next day, either, but finally called the employer at the end of the day and said his car broke down. The claimant was given the option of continuing his employment as a helper until he was ready to enter the apprenticeship program again. He refused to accept the demotion and was discharged as of March 30, 2011.

The claimant filed a claim for unemployment insurance benefits effective April 3, 2011 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 § 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 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 on March 30, 2011 for failure to complete the HVAC apprenticeship program. He contends he tried to pass the EPA test, but he did not take the test once during 2011 even though he knew his job was in jeopardy. Furthermore, the claimant knew that 100 percent attendance was required in his class work with PHCC, yet he missed multiple classes and missed the opportunity to make up those classes. The claimant's final no-call/no-shows demonstrate his disregard of the employer's interests and of his 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 April 25, 2011, 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/kjw