

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES E HAUN
Claimant

APPEAL NO. 07A-UI-05557-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BOSTON WINDOW CLEANING INC
THE MILLARD GROUP**
Employer

**OC: 05/06/07 R: 02
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Boston Window Cleaning, Inc./The Millard Group (employer) appealed a representative's May 23, 2007 decision (reference 01) that concluded James E. Haun (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 June 20, 2007. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Joseph McDonell of Personnel Planners appeared on the employer's behalf and presented testimony from one witness, Brian Johnson. Based on the evidence, the arguments of the employer, 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 April 15, 2006. He worked full time as a janitor at the employer's Ankeny, Iowa, industrial plant business client on the second shift, 4:00 p.m. to 12:30 a.m., Sunday through Thursday. His last day of work was April 8, 2007. The employer discharged him on that date. The stated reason for the discharge was insubordination.

The employer's paydays are every other Friday, and employees are advised they can come to pick up their paychecks anytime after 12:00 p.m. Friday, April 6 was a payday; however, there was a period of about 45 minutes that afternoon that both Mr. Johnson, the site manager, and the shift supervisor, were called away to deal with an emergency oil spill clean up in the plant, so that there was no one available in the employer's office who could distribute paychecks. When they returned to the office the claimant was there as well as about three other employees. They each greeted the claimant, but when the shift supervisor inquired by way of greeting how

he was doing, he angrily replied to the effect that he was “pissed”, so she stepped back from the claimant. Mr. Johnson then stepped in and asked how the claimant was; the claimant got up to within about two feet from Mr. Johnson and yelled that he was upset because he had to “f - - - ing” wait for his “f - - - ing” paycheck. Employees who were about 20 feet away from the situation could clearly hear the claimant’s statement. Mr. Johnson then retrieved and delivered the claimant’s paycheck, and initiated the process to complete the termination when the claimant next reported for work on April 8.

At the time of the incident the claimant was on a 90-day probation which had begun March 28 due to a no-call/no-show on March 22 for which he had also been suspended. The terms of the probation were that discharge would occur if there were any additional attendance or other policy violation within the 90-day period. The employer’s policies of which the claimant was on notice provide for discharge for insubordination and abusive language.

The claimant established a claim for unemployment insurance benefits effective May 6, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$403.00.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct, even in the case of isolated incidents. Myers v. Employment Appeal Board, 462 N.W.2d 734, 738 (Iowa App. 1990). The claimant’s insubordination and use of vulgar language toward his manager 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 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 May 23, 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 April 8, 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 \$403.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css