

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HARVEY L HORNBECK
Claimant

APPEAL NO. 06A-UI-09661-NT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

DES STAFFING SERVICES INC
Employer

**OC: 09/03/06 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Leaving
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated September 28, 2006, reference 02, that concluded the claimant was qualified to receive unemployment benefits because the claimant was discharged for unsatisfactory work under non-disqualifying conditions. A telephone hearing was held on October 17, 2006. The parties were properly notified about the hearing. The claimant participated in the hearing. Mr. Chad Cocking and Ms. Kathy Anderson participated in the hearing on behalf of the employer.

ISSUES:

Did the claimant voluntarily quit his work for reasons that qualify him to receive unemployment insurance benefits? Was the claimant discharged for misconduct connected to his work?

FINDINGS OF FACT:

Having reviewed all the evidence in the record, the administrative law judge finds the following facts; Mr. Hornbeck was employed by the captioned employer from July 17, 2005 until September 5, 2006 when he was terminated by the employer due to customer complaints and the claimant's failure to follow work directives. Mr. Hornbeck held the position of salesman and assembler. His supervisor was Mr. Cocking. The claimant worked at the company's Escape Scooters business location. In July of 2006, Mr. Hornbeck was given a written warning about completing warranty work timely, keeping the shop area clean, DOT knowledge and customer complaints. The claimant had been given two verbal warnings in the past for the same issues. Mr. Hornbeck was given 30 days to substantially improve or be terminated.

During the next two months the employer monitored his performance and the claimant was given extra time to improve. When Mr. Hornbeck's shop area continued to be in disarray and complaints continued to come in about his demeanor, rudeness and failure to adhere to sales representations, a decision was made to terminate the claimant. After being warned, Mr. Hornbeck would improve for a time before reverting to unacceptable behavior.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that the claimant was discharged for misconduct in connection with the work. It does.

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 evidence in the record establishes that Mr. Hornbeck had the general ability to perform his duties at the level of competence expected by his employer but that he did not do so on a regular basis. The company acted reasonably by verbally warning the claimant and then warning him specifically in writing before discharging him. After being warned, the claimant's performance would improve temporarily. A decision was made to terminate the claimant when the shop area continued to be in disarray and serious complaints continued to be received about how Mr. Hornbeck treated company customers. (See Exhibit #1). The administrative law judge finds the evidence shows the claimant's conduct was within his control and thus disqualifying.

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.

The claimant has received benefits which he was not entitled.

DECISION:

The unemployment insurance decision dated September 28, 2006, reference 02, is reversed. The claimant was discharged for misconduct and is disqualified for unemployment insurance benefits until he has worked in and has been paid wages in insured work equaling ten times his weekly benefit amount, providing he meets all other eligibility requirements. The claimant is overpaid \$2,151.00.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

tpn/pjs/pjs