

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MATHEW T RIDGWAY
Claimant

APPEAL NO. 07A-UI-00391-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DJW ENTERPRISES INC
Employer

**OC: 03/19/06 R: 02
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, DJW Enterprises, Inc. (DJW), filed an appeal from a decision dated January 3, 2007, reference 03. The decision allowed benefits to the claimant, Mathew Ridgway. After due notice was issued, a hearing was held by telephone conference call on January 29, 2007. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Owner Douglas Witzenburg.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Mathew Ridgway was employed by DJW from January 9 until December 12, 2006. He was a full-time laborer. At the beginning of his employment, the claimant and the other members of his crew were trained by Owner Douglas Witzenburg as to how the job of pouring concrete should be done. Walls, steps, stoops and basement floors were poured for contractors for home building.

Throughout the course of his employment the claimant and the other members of the crew had been warned three or four times about poor work quality. Footprints were left in the concrete, walls and stoops were not level, power trowling and steps were not done correctly. Everyone was warned that failure to improve could result in discharge. At least two contractors had withdrawn their business from DJW because of this crew's poor work. The employer had had to tear out and replace some of this crew's work at a considerable cost.

On December 11, 2006, the employer received word he was going to lose the business of yet another contractor. The claimant and his crew had poured a stoop which was two and one-half inches out of level. It had to be torn out and replaced at a cost of \$4,000.00. The claimant and the rest of the crew were discharged on December 12, 2006.

Mathew Ridgway has received unemployment benefits since filing a claim with an effective date of March 19, 2006.

The record was closed at 9:10 a.m. At 9:49 a.m. the claimant called and requested to participate. He had received the notice of the hearing prior to the scheduled date but had not carefully read the instructions and did not provide a telephone number where he could be contacted.

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 claimant had been advised his job was in jeopardy as a result of his poor work quality. The unsatisfactory performance cost the employer substantial loss when the jobs would have to be torn out and replaced. In spite of the warnings, the work quality did not improve and this conduct resulted in another contractor withdrawing its business from DJW. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the January 29, 2007 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the hearing, the claimant failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

DECISION:

The representative's decision of January 3, 2007, reference 03, is reversed. Mathew Ridgway is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$790.00.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw