

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

STEVEN JONES

Claimant

APPEAL NO. 14A-UI-11969-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLIED BARTON SECURITY SERVICES

Employer

OC: 10/19/14

Claimant: Respondent (2)

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

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Allied Barton Security Services, LLC (employer) appealed an unemployment insurance decision dated November 10, 2014, (reference 01), which held that Steven Jones (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 November 10, 2014. The claimant participated in the hearing with friend and John Deere employee Robert Steinbach. The employer participated through Supervisor Nick Ellringer, District Recruiter Jeff Faudere, Manager Patrick Lant, and Employer Representative Karen Cimino. Employer's Exhibits One through Four were admitted into evidence.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 25, 2012, as a full-time security guard assigned to work at John Deere and most recently worked as a full-time shift supervisor. He was discharged on October 22, 2014, after the employer became aware the claimant had been convicted on June 27, 2013, in an Iowa court for Operating a Motor Vehicle While Intoxicated (OWI).

A condition of employment was a valid driver's license and a good driving record for three consecutive years. The employer's rules and standards of conduct advise employees they can be terminated for a serious violation of any company policy or state/federal statute, regulation or rule. An employee can also be terminated for failure to provide information regarding criminal activity.

On October 10, 2014, the employer received a compliance warning in their WinTeam tracker system to do a motor vehicle records check on the claimant. The Human Resources Department was required to investigate and ran a motor vehicle history. It was learned on October 22, 2014, that the claimant failed the motor vehicle records check due to the OWI in 2013. He was discharged at that time. The claimant contends he told Manager Patrick Lant about the criminal charges and the loss of his license but Mr. Lant denies that claim. The claimant's friend with whom he worked at John Deere testified on the claimant's behalf but he admitted he was not aware of the claimant's OWI conviction until the time of termination.

The claimant filed a claim for unemployment insurance benefits effective October 19, 2014, and has received benefits after the separation from employment in the amount of \$2,593.00. Employer Representative Karen Cimino provided 13 pages of documentation for the fact-finding interview, which were the same documents provided for the hearing today. She also provided her name and number for any follow-up questions.

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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on October 22, 2014, after the employer learned the claimant had been convicted of an OWI in June 2013, which violated company policies. Where an individual's driving restrictions have been self-inflicted and the individual had reason to know that his driving record was putting his job in jeopardy, his actions can be found to be intentional, and therefore disqualifying misconduct. *Cook v. Iowa Department of Job Service*, 299 N.W.2d 698 (Iowa 1980).

The only remaining issue is whether the discharge occurred for a past act. While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge or disciplinary suspension for misconduct cannot be based on such past act(s). The termination or disciplinary suspension of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

The employer received an alert as to a problem with the claimant's driver's license on October 10, 2014, and discharged him on October 22, 2014, after learning he failed the motor vehicle records check. Consequently, the claimant was discharged for a current act. However, he contends he told his manager about the OWI at the time and that his manager signed documents which allowed the claimant to obtain a work driving permit. The manager denies knowledge of this claim and the claimant could have easily provided documentation proving this, if that was the case but no documentation was provided. If a party has the power to produce

more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer has met its burden to establish the claimant was discharged for disqualifying misconduct. Benefits are denied.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

The claimant received \$2,236.00 in unemployment insurance benefits. The benefits were not received due to fraud or willful misrepresentation and the employer witness did not personally participate in the fact-finding interview. However, the employer representative sent in detailed written documentation which contained factual information regarding the reasons for the discharge. The information provided was of the quantity and quality that, if unrebutted, would be sufficient to result in a decision favorable to the employer. In accordance with the Agency definition of participation, the employer participated in the fact-finding interview and its account is not subject to charge. See 871 IAC 24.10. Consequently, a waiver cannot be considered and the claimant is responsible for repaying the overpayment amount of \$2,593.00.

DECISION:

The unemployment insurance decision dated November 10, 2014, (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 claimant is overpaid benefits in the amount of \$2,593.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs