

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AARON L MILES
Claimant

APPEAL NO: 14A-UI-08182-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

RIVERBEND HOLDINGS LLC
Employer

OC: 07/13/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 1, 2014, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 28, 2014. The claimant participated in the hearing with his wife/witness Sandy Miles. Kevin Brown, Owner/President, and Sherri Yasenoch, Office Manager, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production crew member for Riverbend Holdings from September 24, 2013 to July 14, 2014. He was discharged for falsification of his employment application and not being forthcoming about being on the sex offender registry.

The claimant went to jail on March 27, 2014 and his wife notified the employer. The claimant was sentenced in December 2013 to serve 120 days in jail for violation of a no-contact order against a former female coworker. He was instructed to report to jail January 10, 2014 and had been granted work release. The employer was not aware of the length of his sentence or the reason for it as the claimant left work for several court dates he said were related to a "tiny harassment suit." The claimant did not provide the work release paperwork to the employer until January 28, 2014 and it returned the required paperwork to the claimant January 30, 2014, but the claimant failed to report to jail January 10, 2014, or any time after that date, until his arrest on March 28, 2014 on an outstanding warrant for not reporting to jail January 10, 2014.

While the claimant was in jail the employer began hearing rumors about the claimant's criminal background in July 2014 that did not match his employment application (Employer's Exhibit One). The claimant indicated on his application he had been convicted of a felony but it was over seven years ago. The employer conducted a background check at the time of the claimant's hire and found numerous charges but none that would affect his job. After hearing the rumors, the employer performed a more extensive background check and discovered the claimant was convicted of two attempted gross sexual imposition cases in Ohio, one in 1991 and the other in 2008, the latter of which did not occur more than seven years prior to the claimant's application with the employer. The claimant must register as a sex offender.

The employer's business is a foundation repair company. It goes into homes and businesses to perform its work. Because of the claimant's lack of honesty on his employment application and being a registered sex offender, the employer did not allow the claimant to return to work after he was released from jail July 8, 2014 and the claimant went to talk to the employer July 14, 2014.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,304.00 since his separation from this employer.

The employer participated in the fact-finding interview personally through the statements of Sherri Yasenchok, Office Manager.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was in jail from March 28 through July 8, 2014. Under Iowa law, when an employee goes to jail the employer can consider the employee to have voluntarily quit his job. In this case, however, the employer held the claimant's job until such time as it learned the full extent of his criminal felony record.

The employer's employment application asks whether the applicant has ever been convicted of a felony and provides a space for the applicant to explain the circumstances. A conviction does not necessarily disqualify the applicant from being hired by the employer. The employer did conduct a background check on the claimant but did not do a search outside of Iowa. The employer's background check was sufficient, however, and it cannot be faulted for the background check it did, which was a standard background check.

While it is understandable that the claimant was reluctant to disclose his status as a sex offender and the extent of his criminal record to the employer, given the nature of the employer's business it had a right to know. The employer conducts its business in residential and commercial properties, which can include children and dependent adults. The employer's liability was too great for it to continue the claimant's employment.

The other issue involves the claimant's dishonesty on his employment application, which clearly asks if the applicant has ever been convicted of a felony. Although the claimant indicated he had an "assault over 7 years ago," that was not a complete and truthful response. The claimant did not include his most recent felony conviction in Ohio in 2008 and had he been forthcoming about his record and status as a sex offender the employer most likely would have made the decision not to employ him due to the fact its employees must enter customer's homes and businesses. Instead, the claimant denied the employer the opportunity to make that decision knowing all of the pertinent information.

The administrative law judge understands it is difficult for convicted felons, or any individual with a criminal record let alone a sex offender registry requirement, to secure employment. The administrative law judge also commends the employer for giving those with criminal records a second chance by providing employment opportunities to them. Under these circumstances however, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits must be denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant’s employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview personally through the statements of Sherri Yasenchok, Office Manager. Consequently, the claimant’s overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,304.00.

DECISION:

The August 1, 2014, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 has received benefits but was not eligible for those benefits. Therefore, the claimant is overpaid benefits in the amount of 2,304.00.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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