

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES E FERGUESON**  
Claimant

**APPEAL NO: 11A-UI-11420-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NEIGHBORHOOD PATROL INC**  
Employer

**OC: 08/07/11**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a - Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated August 29, 2011, reference 01, that held the claimant was not discharged for misconduct on August 6, 2011, and benefits are allowed. A telephone hearing was held on September 21, 2011. The claimant participated. Dick Rogerson, HR Director, David Lee, and Stewart Holloway, Managers, participated for the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on December 17, 2000, and last worked for the employer as a full-time security guard on assignment at the Hub Tower on August 6, 2011. The claimant worked the assignment during the course of employment, and his schedule was 8:00 a.m. to 4:00 p.m.

About August 2010, the Hub Tower-client requested to change the security schedule to 6:00 a.m. to 2:00 p.m. The claimant was advised by employer-management that he needed to report to work by 6:00 a.m. He responded that he relied upon public transportation (bus) to get him to and from work, and that he might be 2 or 3 minutes late for this reason.

On June 29, 2011, the Hub Tower-client notified the employer that no security guard had arrived for work by 6:00 a.m. and the employer investigated. It learned from claimant that the bus did not get to him work until about 15 minutes after his start time. On July 6, Manager Lee advised claimant he needed to report to work on time and that he should consider alternate transportation.

On August 3, the employer vice-president in the presence of Manager Lee advised claimant that he needed to get to work on time or consider other employment. Managers observed claimant reporting to work late by 15 minutes on August 4/5 and he was discharged for repeated tardiness on August 6. The employer also notes claimant had been submitting a timesheet record to be paid based on a 6:00 a.m. start time.

Claimant has been receiving unemployment benefits on his current claim.

### **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 administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on August 6, 2011 due to a repeated pattern of tardiness.

Issues such as oversleeping, childcare and transportation are not a reasonable ground and/or excusable reasons for missing work. Higgins v. IDJS, 350 NW2d 187 (Iowa 1984); Harlan v. IDJS, 350 NW2d 192 (Iowa 1984).

The claimant agreed to work the new start time of 6:00 a.m., and worked this schedule for more than a year. If he had chosen to quit his job due to the transportation issue when warned on

July 6, it would not be considered as a good cause attributable to the employer. (See Iowa Code section 96.5-1; 871 IAC 24.26.1)

Whether claimant had fudged his start time by a few minutes or more from August 2010, the employer made it clear on July 6 that it would enforce 6:00 a.m. It gave him a reasonable length of time to comply, and it warned him again on August 3. His repeated and continuing pattern of tardiness as shown by August 4/5, 2011 constitutes job disqualifying misconduct.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since claimant has been disqualified by reason of this decision, the overpayment issue is remanded to Claims to issue a decision.

**DECISION:**

The department decision dated August 29, 2011 reference 01 is reversed. The claimant was discharged for misconduct on August 6, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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