

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONALD M BURNS
Claimant

APPEAL NO. 09A-UI-07630-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

I & I INC
Employer

OC: 02/08/09
Claimant: Respondent (1)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Irv's Trucking filed a timely appeal from a representative's decision dated May 19, 2009, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 11, 2009. Although duly notified, the claimant did not participate. The employer participated by Mr. Irvin Wagner, Company President.

ISSUES:

The issue is whether the claimant was separated from employment for misconduct.

Whether the employer's account may be charged for benefits paid.

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds: Donald Burns was employed as an over-the-road tractor trailer driver for Irv's Trucking from October 26, 2006 until January 1, 2008 when he was separated due to lack of work when the company was sold to new owners. No further work continued to be available to Mr. Burns at that time as Irv's Trucking had discontinued his over-the-road tractor trailer operations and sold some portion of the company to new owners, Hinz Enterprises.

It is the employer's position that as Mr. Burns may have accepted employment with the new employer, benefits attributable to wage credits earned while employed with Irv's Trucking should not be attributable to the company. Mr. Wagner is unaware as to whether any or all of the requirements for Hinz Enterprises to become a successor employer had been accomplished.

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.

871 IAC 23.28 provides:

Successor.

23.28(1) Definition of "successor employer" as used in Iowa Code section 96.7 and these rules means an employing unit which:

a. Acquired the organization, trade or business, or substantially all the assets of an employing unit that was subject to the provisions of chapter 96 prior to the acquisition, regardless of whether the acquirer was an employing unit prior to the acquisition. The acquiring employer must continue to operate the enterprise or business.

b. An employing unit that acquired a severable portion of the business of an employer who is subject to chapter 96 providing:

(1) The portion of the business or enterprise acquired would have in itself met the requirements of section 96.19(16)"a."

(2) An application is made for a transfer of the records of the severable portion transferred within 60 days from the date of transfer.

(3) The transfer of records meets the approval of the predecessor and department and adequate information is furnished to meet the requirements.

c. Transfer or discontinuance of business. A period of one year has been defined as any four consecutive calendar quarters.

23.28(2) An "organization," "trade" or "business" as used in section 96.19(5)"b" is acquired if an employing unit acquires factors of an employer's organization, trade or business sufficient to constitute an entire existing going business unit as distinguished from the acquisition of merely assets from which a new business may be built. The question of whether an organization, trade or business is acquired is determined from all the factors of the particular case. Among the factors to be considered are:

- a. The place of business.
- b. The staff of employees.
- c. The customers.
- d. The good will.
- e. The trade name.
- f. The stock in trade.
- g. The accounts receivable.
- h. The tools and fixtures.
- i. Other assets.

23.28(3) Substantially all of the assets as used in section 96.19(5)"b" are acquired if an employing unit acquires substantially all of the assets of any employer which generate substantially all of the employment, except those retained incident to the liquidation of obligations.

23.28(4) A segregable and identifiable part of enterprise as used in Iowa Code section 96.7(3)"b" is acquired if an employing unit acquires factors of any employer's organization, trade or business sufficient to constitute an existing separable going business unit as distinguished from the acquisition of merely assets from which a new business may be built. The part of the business acquired, if considered separately, would have been liable under section 96.19(16)"a." The question of whether a distinct and severable portion is acquired is determined from all of the factors of the particular case. Among the factors to be considered are:

- a. The place of business.
- b. The staff of employees.
- c. The customers.
- d. The good will.
- e. The trade name.
- f. The stock in trade.
- g. The accounts receivable.
- h. The tools and fixtures.

23.28(5) "Successor liability" as used in Iowa Code chapter 96, and these rules, occurs for the acquiring employing unit when there is a transfer of the predecessor's assets or other physical components necessary to continue the operation of the enterprise or business to the successor employer and the successor employing unit must continue to operate the business to the same basic extent as if there had been no change in the ownership or control of the business or enterprise.

The evidence in the record establishes that Mr. Burns' employment with Irv's Trucking came to an end on or about January 1, 2008, when no further work continued to be available to him with

Irv's Trucking. Irv's Trucking had sold a portion of its company that dealt with over-the-road trucking to a different employer. The evidence in the record does not indicate that Hinz Trucking became a successor employer, which would be liable for unemployment insurance benefits based upon Mr. Burns' employment with Irv's Trucking. The administrative law judge thus concludes that the claimant's separation from his employment with Irv's Trucking on or about January 1, 2008 occurred due to lack of work under nondisqualifying conditions. Benefits payable based upon wage credits accrued while employed with Irv's Trucking are chargeable to Irv's Trucking, providing that Hinz Enterprises has not become a successor employer.

DECISION:

Representative's decision dated May 19, 2009, reference 02, is affirmed. Claimant was laid off under nondisqualifying conditions. Unemployment insurance benefits based upon wage credits accrued while working for Irv's Trucking are chargeable to Irv's Trucking, provided that another employer has not become the successor employer in this matter.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

srs/css