

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CRAIG M HAYDEN**  
Claimant

**APPEAL NO. 11A-UI-14262-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ASPLUNDH TREE EXPERT CO**  
Employer

**OC: 10/02/11**  
**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Benefit Overpayment

**STATEMENT OF THE CASE:**

Asplundh Tree Expert Co. filed a timely appeal from a representative's decision dated October 21, 2011, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on November 29, 2011. The claimant participated personally. The employer participated by Mr. Kim Woltering, general foreman; Mr. Mark Peterson, foreman; and Mr. Robin Kriesel, tree trimmer.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Craig Hayden was employed by Asplundh Tree Expert Co. from May 1, 2011, until October 5, 2011, when he was discharged from employment. Mr. Hayden held the position of full-time apprentice trimmer and was paid by the hour. His immediate supervisor was Mark Peterson, foreman.

The claimant was discharged for failure to follow work instructions. On September 27, 2011, Asplundh Tree Expert Co. received an official complaint from the utility company that the company was providing services for. A consumer had complained to the utility company that Asplundh Tree Expert Co. employees were using loud and vulgar language, excessively using cell phones, and that they appeared to be taking excessive breaks lying on the ground. The utility company concluded that the conduct of Asplundh's employees was reflecting badly on the utility company and ordered Asplundh Tree Expert Co. to stop the practice.

Mr. Woltering, the general foreman, contacted all the members of the crew that Mr. Hayden was assigned to and gave the crew specific work instructions by telephone. The crew members were specifically instructed to refrain from using vulgar language and excessive use of cell phones, and were also specifically instructed to take all breaks inside the trucks. Employees

were instructed not to take breaks while sitting or lying on the ground. Employees were warned that failure to follow the instructions would result in termination from employment.

Subsequently, on October 5, 2011, Mr. Woltering was again contacted by a representative of the utility company who again reported that a complaint had been received from a consumer that one or more members from the crew had been observed "laying on the ground." The consumer, at that time, was concerned that the Asplundh employee may have been "electrocuted."

The crew leader, Mr. Peterson, was directly contacted with the most recent complaint by Mr. Williams from the utility service, as he and Mr. Kriesler were checking utility lines ahead of the rest of the crew. Mr. Peterson concluded that the claimant was the individual who was observed lying on the ground, because Mr. Hayden's location was where the consumer had complained. When questioned about the matter, Mr. Hayden did not deny the allegation of lying on the ground. Because the utility company had mandated that the employees involved in the most recent incident be removed from utility contract work, the claimant was discharged.

It is Mr. Hayden's positioned that he had discontinued using inappropriate language or excessively using his cell phone after being warned. Mr. Hayden agrees that he had been taking his "break" while lying on the ground on October 5, 2011, while other employees were checking utility lines ahead of the crew.

#### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

In this matter, Mr. Hayden was discharged because his violation of a reasonable and work-related directive jeopardized the employer's contract for tree cutting with a large client, a public utility district. Because of the claimant and other workers' initial conduct, the utility firm had received complaints from consumers about the Asplundh Tree Expert crew's activities. The complaints included vulgar language, excessive use of cell phones, and sitting or lying on the ground during what appeared to be working hours. The client's complaints to the company were relayed to the crew by the company's general foreman. Mr. Hayden and other workers were specifically warned not to engage in the above practices and specifically instructed to take all breaks inside the trucks to prevent the perception that the employees were not performing services during working hours. Although specifically instructed not to take breaks sitting or lying on the ground and warned that violation of the work rules could result in termination, Mr. Hayden nevertheless chose to again take one or make break periods laying on the ground, causing additional complaints to the utility service and to Asplundh Tree Expert Co.

The administrative law judge concludes, based upon the evidence in the record, that Mr. Hayden was aware of the employer's work expectations and had been properly warned. The claimant's failure to abide by the work rules and warning showed a disregard for the employer's interests and standards of behavior and thus was disqualifying conduct under the provisions of the Employment Security Law. Unemployment insurance benefits are withheld.

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.

The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

**DECISION:**

The representative's decision dated October 21, 2011, reference 01, is reversed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he meets all other eligibility requirements of Iowa law. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the Unemployment Insurance Services Division for a determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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