

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KEVIN E CALMER**  
Claimant

**APPEAL NO. 06A-UI-11263-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BALL PLASTIC CONTAINER CORP**  
Employer

**OC: 10/29/06 R: 02  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer, Ball Plastic Container Corporation (Ball Plastic), filed an appeal from a decision dated November 17, 2006, reference 01. The decision allowed benefits to the claimant, Kevin Calmer. After due notice was issued a hearing was held by telephone conference call on December 11, 2006. The claimant participated on his own behalf. The employer participated by Department Manager Denny Alley, Human Resources Manager Jolene Welp, Production Manager Tim Malott and was represented by Unemployment Services LLC in the person of Lucy Reed Exhibits One, Two, Three and Four were admitted into the record.

**ISSUE:**

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

**FINDINGS OF FACT:**

Kevin Calmer was employed by Ball Plastic from July 24, 1996 until October 17, 2006. He was a full-time warehouse worker whose duties primarily involved driving a fork truck. As part of his duties he was to make a safety check of the lift every day before taking it to the production floor.

In December 2005 he received a three-day suspension for violation of company rules. He had a cup of coffee on the production floor and this is strictly prohibited, not only by company policy but by federal department of agriculture guidelines. The disciplinary action notified him he could be discharged for any further violations.

On November 1, 2006, the claimant was involved in an accident where a pedestrian employee ran into his fork truck. An investigation of the accident was done by Production Manager Tim Malott and Department Manager Denny Alley which included an inspection of the fork truck. They discovered that the back up horn, the device which beeps when the equipment is in reverse, was covered with a piece of beige masking tape, which was then colored black, presumably by a felt marker. Mr. Alley and Mr. Malott tested the fork lift by having another

employee put it in reverse and they listened to determine if the horn could be heard. It could not, even from as short a distance as 18 inches.

The claimant was questioned and stated he had done the safety inspection in the morning as required and, when asked the first three times, he said he could hear the horn when he put the lift in reverse. The fourth time he was asked he admitted that he had not heard the horn. He was suspended pending further investigation. It is a violation of company policy to operate any equipment in an unsafe manner, to operate equipment without the proper safety guards in use and failing to follow safety rules. The employer could not determine if the claimant put the tape on the horn but it was considered a violation of the safety rules for him to operate the lift without making sure all the safety equipment was working properly.

After the investigation and review of his personnel file, the claimant was discharged on November 3, 2006, by Mr. Malott. He has received unemployment benefits since filing a claim with an effective date of October 29, 2006.

#### **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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant had been suspended previously for violations of company policy and advised further incidents could lead to discharge. In the final incident he was operating company equipment on company premises without having ascertained it was fully in compliance with the safety rules. Although Mr. Calmer at first maintained he had checked the back up horn, he heard it from a distance of "a foot." However, the purpose of the back up horn is to that other employees could hear it from a distance considerably greater than a foot. It could not be heard by either Mr. Malott or Mr. Alley from six feet away and not even from 18 inches. The claimant was in violation of the company policy by not adequately checking the equipment he was operating. This caused a safety hazard for other employees and is conduct not in the best interests of the employer. He is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of November 17, 2006, reference 01, is reversed. Kevin Calmer is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$347.00.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs