

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICK W GASIOROWSKI
Claimant

APPEAL NO. 08A-UI-07444-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN GAMES INC
Employer

**OC: 07/13/08 R: 01
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated August 6, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on September 2, 2008. The claimant participated. The employer participated by Josh Burrows, attorney at law, and witnesses Phillip Van Ommerend, Chris Blair, and Tom Adams.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with his work and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from June 12, 2006, until June 11, 2008, when he was discharged for excessive absenteeism. Mr. Gasiorowski was employed as a full-time production worker and was paid by the hour. His immediate supervisor was Phillip Van Ommerend.

The claimant was discharged when he exceeded the permissible number of attendance infractions allowed under company policy. The claimant was aware of the policy and had been warned prior to his discharge. Under the company attendance policy, employees are subject to discharge if they exceed a set number of attendance infractions. Infraction points are removed after a certain amount of time elapses. During the course of his employment, Mr. Gasiorowski had been absent for a number of reasons, which included sickness, transportation problems, headaches, and anger management.

The claimant was discharged when he failed to report for scheduled work on June 9, 2008. The claimant had left the previous Friday for medical reasons and had been released to return to work. Mr. Gasiorowski did not report on June 9, 2008, because he had insufficient gasoline to drive to work. The claimant called in that day but stated no reason for being absent.

Mr. Gasiorowski was aware at that time that his employment was in jeopardy and that further attendance violations could result in his termination from employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Gasiorowski was discharged for misconduct in connection with the employment. It does.

The evidence in the record establishes the claimant had been absent on numerous occasions for a variety of reasons. The claimant's reasons included sickness, headaches, anger management, and repeated transportation problems. The employer warned the claimant that his employment was in jeopardy. The claimant nonetheless called in on June 9, 2008, and indicated that he would not be reporting to work. The claimant did not report to work because he had insufficient funds to purchase gasoline for his vehicle that day.

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.

Based upon the totality of the evidence in the record, the administrative law judge concludes that the claimant's absenteeism was excessive and that the claimant had been properly warned before being discharged.

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.

DECISION:

The representative's decision dated August 6, 2008, reference 01, is hereby reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount. The matter of potential overpayment is remanded to the Claims Division for determination as to whether there has been overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw