

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES D LUMADUE
Claimant

APPEAL NO: 13A-UI-13172-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

KUM & GO LC
Employer

**OC: 10/27/13
Claimant: Respondent (2)**

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 November 20, 2013, reference 01, that held the claimant was not discharged for misconduct on September 25, 2013, and benefits are allowed. A telephone hearing was held on December 18, 2013. The claimant did not participate. Mike Leavengood, District Supervisor, participated for the employer.

ISSUES:

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

Whether claimant is overpaid unemployment benefits.

Whether claimant should repay a benefit overpayment.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant was hired on December 14, 2011, and last worked for the employer as a clerk on September 25, 2013. While watching a security video with the store manager on September 24, the district manager observed claimant using a price over-ride to discount payment for a pack of cigarettes. The pack cost is \$8.09 but claimant used his personal code to over-ride and he paid \$3.00. The register journal tape confirmed what claimant had done. The employer discharged claimant for theft on September 25 that is grounds for immediate termination.

Claimant failed to respond to the hearing notice with a phone number to be called for the hearing. UI Appeals staff thought it was claimant who had called in, but the judge noted it was the employer district manager and corrected it on C2T control system.

Claimant has received six weeks of unemployment benefits from October 27 thru December 7, 2013 totaling \$2,010. The employer did not participate in department fact-finding and the

employer witness had no direct knowledge on this issue. No employer representative participated regarding the fact-finding issue in that or this matter.

Claimant did not commit any act of fraud or misrepresentation to obtain benefits.

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 employer has established claimant was discharged for misconduct in connection with employment on September 25, 2013 for theft.

The employer offered testimony based on reliable evidence claimant discounted the payment price of a cigarette pack to save himself \$5 that is an act of theft.

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 administrative law judge further concludes claimant is overpaid benefits \$2,010 but he is not required to repay it due to employer failure to participate in department fact finding. The employer representative did not participate at fact finding and it did not offer a witness in this matter regarding this issue though it is clearly stated on the hearing notice.

Claimant is not required to repay the \$2,010 overpayment. He committed no act of fraud or misrepresentation. The employer's account is charged.

DECISION:

The department decision dated November 20, 2013, reference 01, is reversed. The claimant was discharged for misconduct on September 25, 2013. 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. Claimant is not required to repay the \$2,010 overpayment and the employer's account is charged.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs