

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HOWARD D SLAUGHTER
Claimant

APPEAL NO. 07A-UI-08610-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AMERICAN BUILDING MAINTENANCE
COMPANY OF KENTUCKY**
Employer

**OC: 08/05/07 R: 03
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments
Section 96.6(2) – Timeliness of Protests

STATEMENT OF THE CASE:

American Building Maintenance Company of Kentucky (ABM) filed an appeal from a representative's decision dated August 28, 2007, reference 04, which held that the protest to Howard Slaughter's claim was not filed timely. After due notice was issued, a hearing was held by telephone on September 25, 2007. Mr. Slaughter participated personally. The employer participated by Shawn Conrad, Human Resources Manager; Jarl Pierson, Project Manager; and Danielle Acierno of Talx Corporation. The employer was represented by Kellen Anderson of Talx Corporation. Exhibits One through Five were admitted on the employer's behalf.

ISSUE:

The primary issue in this matter is whether the employer filed a timely protest to Mr. Slaughter's claim. If the protest is determined to be timely, the issue then becomes whether he was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Slaughter filed a claim for job insurance benefits effective August 5, 2007. Notice of the claim was mailed to the employer at its address of record on August 13. The notice advised that any protest to the claim had to be received by Workforce Development or postmarked by August 23. The protest was faxed to Workforce Development. The transmission date imprinted by the fax machine on the protest indicates it was faxed at 16:48 on August 23, 2007.

Mr. Slaughter was employed by ABM from October 16, 2006 until March 2, 2007. He worked approximately 20 hours each week as a janitor. He was discharged for reporting to work under the influence of alcohol. On December 4, 2006, it was noted that Mr. Slaughter smelled of alcohol. When questioned, he indicated he had consumed a couple of beers at approximately

1:00 p.m. before reporting to work at 9:00 p.m. He was warned that he should not report to work smelling of alcohol.

On February 26, 2007, it was again noted that Mr. Slaughter appeared to be under the influence of alcohol while at work. He smelled of alcohol and appeared to be slurring his speech. The project manager asked if he would be willing to submit to a breath-alcohol test and Mr. Slaughter indicated he would not be able to pass one. He admitted that he had consumed alcohol before reporting to work. Mr. Slaughter had consumed at least a pitcher of beer and had stopped drinking at approximately 5:30 p.m. He was taken home and directed to report to the district manager the following morning. On February 27, he was suspended for three days pending a further determination regarding his employment status. Mr. Slaughter was notified of his discharge on March 2, 2007.

The building manager who picked Mr. Slaughter up for work on February 26 noted that he had been drinking more than usual. She noted that he was laughing at nothing and appeared unable to complete sentences. The building manager indicated she would not allow Mr. Slaughter to work on Sundays anymore because it appeared that his drinking was out of control.

REASONING AND CONCLUSIONS OF LAW:

The representative's decision indicated that the employer's protest had not been filed timely. The protest was due on August 23, 2007. The employer was entitled to the full day of August 23 in which to perfect its protest. The protest was, in fact, faxed to Workforce Development on August 23, 2007. The fact that it was faxed after the Workforce Development office closed does not preclude a finding that it was timely filed. For the above reasons, the administrative law judge concludes that the protest was filed timely. Therefore, the agency has jurisdiction over the separation issue.

Mr. Slaughter was discharged by ABM. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Slaughter's discharge was prompted by the fact that he reported to work under the influence of alcohol on February 26, 2007. He had been warned about such conduct on December 4, 2006, and knew that reporting to work under the influence of alcohol was contrary to the employer's standards.

Mr. Slaughter consumed at least one pitcher of beer less than four hours before he had to report for work. His statement to the employer that he could not pass a breath-alcohol test suggests he knew he had consumed too much alcohol before reporting for work. Inasmuch as Mr. Slaughter had been previously warned about reporting to work under the influence of alcohol, the administrative law judge concludes that his conduct of February 26 constituted a substantial disregard of the standards the employer had the right to expect. It is concluded, therefore, that disqualifying misconduct has been established and benefits are denied.

Mr. Slaughter has received benefits since filing his claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated August 28, 2007, reference 04, is hereby reversed. The employer filed a timely protest to Mr. Slaughter's claim. He was discharged for disqualifying misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he satisfies all other conditions of eligibility. Mr. Slaughter has been overpaid \$313.00 in job insurance benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs