

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAY W BAIER
Claimant

APPEAL NO. 12A-UI-12846-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

COUNCIL BLUFFS COMM SCHOOL DIST
Employer

OC: 09/23/12
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Council Bluffs Community School District filed a timely appeal from a representative's decision dated October 19, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 28, 2012. Claimant participated. The employer participated by Mr. Thomas Kuiper, Hearing Representative and witnesses: Brandi Gabrick, Bryan McEvoy, Todd Danker, Ed Thomas, Janet Reiner and Katheryn Hubbard. Employer's Exhibits One, Three, Four, Six and Seven were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Jay Baier was employed by the Council Bluffs Community School District from July 1, 2009 until September 11, 2012 when he was suspended pending his discharge from employment. Mr. Baier was employed as a full-time assistant custodian and was paid by the hour. His immediate supervisor was Mr. Mike Pratt.

Mr. Baier resigned his position with the Council Bluffs Community School District in lieu of being discharged from employment.

On August 31, 2012, it was reported to management of the Council Bluffs Community School District that Mr. Baier had been observed removing property of the school district and placing it in his personal vehicle without authorization. Based upon the allegation the employer began to investigate.

On the evening of August 29, 2012, Mr. Baier was observed by Mr. Todd Danker and Mr. Ed Thomas leaving the Abraham Lincoln High School facility carrying a box and a clear/opaque

trash bag. In the trash bag the observers could see rolls of unused toilet paper. Both witnesses personally observed Mr. Baier deposit the cardboard box into a dumpster and then go to his van where the claimant was observed placing the toilet paper into his van. Subsequently the claimant went to a recycling area and then returned. After considering the matter, the witnesses concluded the claimant had been engaged in theft and reported the matter to upper management. Based on Mr. Baier's denials, the employer further investigated. A review of security tapes confirmed the witnesses' observations and a decision was made to terminate Mr. Baier from his employment. Per the claimant's request he was allowed to resign instead of being discharged.

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.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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 insurance 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 Ct. of Appeals 1992).

In the case at hand the evidence in the record establishes that Mr. Baier elected to resign his position in lieu of being discharged. The evidence in the record establishes that Mr. Baier was personally observed by two witnesses and by video surveillance on the night of August 29, 2012 removing the property of the Council Bluffs Community School District for his own use without authorization. This conduct showed a willful disregard for the employer's interests and standards of behavior that the employer had a right to expect of its employees 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.

DECISION:

The representative's decision dated October 19, 2012, reference 01, is reversed. 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 and is otherwise eligible. The issue of whether the claimant must repay unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs