

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CALVIN PORTRAZ
Claimant

APPEAL NO. 09A-UI-06479-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEATON CORPORATION
Employer

**Original Claim: 03/22/09
Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Seaton Corporation (employer) appealed an unemployment insurance decision dated April 16, 2009, reference 01, which held that Calvin Portraz (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 21, 2009. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which he could be contacted and, therefore, did not participate. The employer participated through Tauhirah Freeman, Third Shift Supervisor and Recruiter, and employer representative Susan Murphy. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed most recently as a full-time production worker from November 2, 2008 through March 24, 2009. The employer provides contract labor for large manufacturers and the claimant has worked for this employer several times. He was most recently assigned to work at Proctor and Gamble in Iowa City. Each time the claimant is hired, he goes through orientation, wherein he learns the employer has a zero tolerance policy for using tobacco on the production line. He was issued a written warning on December 4, 2009 for disregarding the employer's requirement to wear steel toe shoes.

On the night of March 22, 2009, the claimant worked third shift in a small production area with one co-worker and another line leader. The company manufactures shampoo and crème rinse. Before starting work that night, the claimant was given a refresher training document to sign and he signed it. The refresher training again advised employees the employer has a zero tolerance for the use of food, tobacco, and candy on the production line. It was the beginning of a week, so the production facility had been cleaned and no garbage, debris, or bottles were found at the

beginning of the shift. After the shift started, the line lead noticed a conditioner bottle filled with tobacco and saliva. The line lead reported it to the third shift supervisor, who conducted an investigation.

Of the three employees who work in that small area, the claimant is the only who uses chewing tobacco. However, he denied using it that night. The supervisor concluded the claimant was the individual who had taken the bottle from the production line and used it to spit chewing tobacco into it. The supervisor prepared a written warning in her investigation and she advised the claimant two different times to write that he disagreed with the conclusions therein, but he simply signed his name. The claimant was discharged on March 24, 2009 for a second violation of company policy even after receiving retraining on the tobacco policy earlier that night.

The claimant filed a claim for unemployment insurance benefits effective March 22, 2009 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for a second policy violation. He had worked there previously, so he was well aware of the employer's policies and was given retraining that very night. Although the claimant denies using chewing tobacco on his shift on March 23, 2009, the preponderance of the evidence confirms he did. The claimant's policy violations show a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated April 16, 2009, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits, because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw