

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JONATHAN L BULLOCK
Claimant

BERNS MOVING INC
Employer

APPEAL 16A-UI-02711-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 02/07/16
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-Finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the February 29, 2016 (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on March 29, 2016. The claimant participated personally. The employer participated through Nathan Berns, owner. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid any unemployment insurance benefits and, if so, can the repayment of those benefits to the Agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed part time as a driver and was separated from employment on August 3, 2015; when he was discharged.

The claimant had previously worked as a driver from the employer, and most recently was employed from June 1, 2015 until August 3, 2015. The claimant has been a mover/driver for over ten years professionally and, consequently, has some pain in his knees associated with work being performed at times. The claimant acknowledged once or twice asking for time off after assignments due to his knees. The employer reported the claimant could not do his job

because his body would not hold up. Because of this, the claimant requested assistance with his job assignment on August 1, 2015 to help him complete the move. By the time the employer provided another employee, the claimant was almost finished. On August 3, 2015, the claimant arrived to work for an employee meeting and an argument broke out between the claimant and Mr. Berns about the August 1, 2015 assignment. The employer indicated the claimant had been warned he could lose his job but was unable to cite to specific dates or incidents, and no written warning was given. The claimant denied not performing work due to his knees. The employer asserted that even if the argument had not ensued, the claimant likely would have been discharged at some point because he was unable to do the job. The claimant denied arguing with the employer but rather Mr. Berns yelled at him for being disrespectful. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$876.00, since filing a claim with an effective date of February 7, 2016, through the week ending February 29, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview on February 26, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. In this case, the employer initiated separation after a disagreement on August 3, 2015 before an employee meeting. The employer stated it intended to discharge the claimant eventually due him being unable to perform the job duties due to his knees hurting. The claimant denied receiving any warning that his job was in jeopardy due to missing time or requesting time off due to his knees. It cannot be ignored the discharge occurred shortly after the argument and not after an incident specifically about the claimant's knees or inability to do the job.

The administrative law judge is not persuaded the employer warned the claimant his job was in jeopardy for any reason. Inasmuch as the employer had not previously warned the claimant about the issue leading to the separation, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. No disqualifying reason for the separation has been established. Benefits are allowed, provided claimant is otherwise eligible.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The February 29, 2016 (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The claimant has not been overpaid benefits and the employer's account is not relieved of charges.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

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