

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD W CASNER
Claimant

APPEAL NO. 09A-UI-14576-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

POLAR PRODUCTS
Employer

OC: 08/23/09
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Polar Products, filed an appeal from a decision dated September 16, 2009, reference 01. The decision allowed benefits to the claimant, Richard Casner. After due notice was issued, a hearing was held by telephone conference call on October 27, 2009. The claimant participated on his own behalf. The employer participated by Warehouseman Aaron Reese, President Doyle Sullivan, Warehouse Driver James Whitlo, Warehouse Foreman James Jensen and was represented by Stephen Banks.

ISSUE:

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

FINDINGS OF FACT:

Richard Casner was employed by Polar Products from November 10, 2008 until August 23, 2009 as a full-time warehouseman and driver. The company has a zero-tolerance policy regarding smoking on company property or on company vehicles and the claimant was aware of this policy.

On August 21, 2009 Warehouse Driver James Whitlo came to President Doyle Sullivan to inform him the claimant had been smoking in a company vehicle on two prior occasions, August 14 and 17, 2009. Mr. Whitlo was being trained by Mr. Casner and when, on the first occasion, the claimant lit a cigarette while in the cab of the vehicle, Mr. Whitlo reminded him of the no-smoking policy. The claimant said, "What the fuck will they do, fire me? I'll just go right to the unemployment office." On the next occasion they were waiting in line at a scrap metal center when Mr. Casner lit up another cigarette, and then another one as they were traveling back to the workplace.

Mr. Whitlo was concerned, being a new hire, that it might cause problems with other employees if Mr. Casner was fired because of his report. The employer agreed to gather other evidence. The claimant was ordered to clean the company trucks on August 24, 2009, which he did over a couple of days. On August 26, 2009, the truck he cleaned that day was inspected at 5:00 p.m.

by Mr. Sullivan, Warehouseman Aaron Reese and Warehouse Foreman Jim Jensen. It was found to be thoroughly cleaned. Mr. Casner was assigned to that truck on August 27, 2009, and he was the only one who drove it on that day. When he returned it that evening it was again inspected by the same three people and found to be covered in cigarette ash on the dash, in the storage pockets and the "under dash." The next morning the claimant was discharged for violation of the policy.

Richard Casner has received unemployment benefits since filing a claim with an effective date of August 23, 2009.

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.

Iowa Code section 96.5-2-b 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:
 - b. If gross misconduct is established, the department shall cancel the individual's wage credits earned, prior to the date of discharge, from all employers.

The claimant was aware of the policy which prohibited smoking in the workplace, including company vehicles. He also knew it was "zero tolerance." In spite of this he smoked in the company vans on at least three occasions. Mr. Casner maintains he never smoked in any of the company vehicles but could provide no convincing reason why the four other individuals would conspire to fabricate the evidence against him, including the eye-witness testimony of Mr. Whitlo.

The record establishes the claimant willfully and knowingly violated the company zero-tolerance policy against smoking in company vehicles. This is not only a violation of the employer's policies but also Iowa Smokefree Air Act. The claimant was discharged for substantial, job-related misconduct and he is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of September 16, 2009, reference 01, is reversed. Richard Casner is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css