

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSIE R THOMPSON

Claimant

APPEAL NO: 13A-UI-13782-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GREG'S LAWN SERVICE INC

Employer

OC: 11/25/12

Claimant: Respondent (2)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Greg's Lawn Service, Inc. (employer) appealed a representative's December 9, 2013 decision (reference 05) that concluded Jessie R. Thompson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on January 15, 2014. The claimant participated in the hearing. Greg Scharf appeared on the employer's behalf and presented testimony from two other witnesses, Justin Harris and Linda Simon. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant overpaid unemployment insurance benefits, and if so is the overpayment subject to recovery?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The claimant started working for the employer on April 5, 2012. He worked full time as laborer. His last day of work was November 11, 2013. The employer discharged him on that date. The stated reason for the discharge was theft of gas.

At about noon on November 11, Harris, the employer's lawn operations manager, as well as a number of other managers, were leaving an offsite insurance office where they had been in a training class. They left in separate vehicles and headed back to the employer's office. On their way, they passed a house where the claimant had parked his work truck out front. A number of them reported that they had seen the claimant filling another vehicle, not one of the employer's vehicles, using a gas can which appeared to be like the gas can which was kept in the truck to refill equipment from the larger tank kept on the truck. The claimant saw Harris pass him, and a

few minutes later he called Harris to tell him that the gas can was his own gas can with his name on it; he was apparently concerned that it might look like he was using the employer's gas can and gas. One of the other managers also spoke with Harris because he also had passed the claimant and thought it looked like he was using the employer's gas can to put gas in a non-work vehicle; Harris asked that manager to double back and to ask to see the gas can.

The other manager did so, but when he arrived back at where the claimant was parked, the claimant looked into the back hatch of the other vehicle, but was unable to produce the "other" gas can. The other manager reported this back to Harris, and Harris then contacted the claimant and indicated he needed to report back to the employer's shop.

When the claimant and his coworker reported back to the shop Harris informed them that Scharf, the president/owner, wanted to speak first to the coworker and then to the claimant. The coworker refused to say anything at all about what had happened regarding the gas can or gas. After Scharf, Harris, and Simon, the human resources/office manager, came out from the discussion with the coworker, they looked for the claimant and he was gone. Harris then called the claimant, who indicated that he had gone home because he had not been told he needed to stay. The claimant then came back to the shop and spoke with the management group. He maintained that he had only used his own gas and gas can. He then volunteered that he had found the gas can in the back hatch of his vehicle, claiming that it had just gotten covered up by some car seats when he had been looking for it to show to the other manager; he suggested to Scharf that he come out to the vehicle to see the gas can. However, by this point Scharf concluded that the claimant was not being truthful and that he had stolen gas from the employer that he put into a personal vehicle. As a result, he discharged the claimant.

The claimant had previously established a claim for unemployment insurance benefits effective November 25, 2012. He reactivated that claim by filing an additional claim effective November 17, 2013. Upon expiration of the 2012 claim year, the claimant established a new unemployment insurance benefit year effective November 24, 2013. The employer did participate in the fact-finding interview leading to the representative's decision which was entered in this case. The claimant has received unemployment insurance benefits after the separation in the amount of \$1,180.00.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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.

871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

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 satisfied its burden to establish by a preponderance of the evidence that the claimant did in fact use the employer's gas can to transfer the employer's gas into a personal vehicle. While the claimant denied this and asserted that it was his own gas can and gas, his credibility is particularly hurt by the facts that he could not produce the gas can when the other manager came to the site, that he unreasonably left the shop after being told that Scharf and the other managers wished to speak to him after they spoke to the coworker, and that then after this unreasonable departure he returned from home and then conveniently and incredibly was able to "find" the gas can in the vehicle where he previously could not find it. The claimant's taking of the employer's gas for his personal vehicle shows 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. The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b. In this case, because the employer did participate in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's December 9, 2013 decision (reference 05) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving

unemployment insurance benefits as of November 11, 2013. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,180.00 which is subject to recovery.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs