

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID NORGART
Claimant

APPEAL NO. 13A-UI-05678-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

OC: 04/21/13
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Rembrandt Enterprises, Inc. (employer) appealed an unemployment insurance decision dated May 8, 2013, reference 01, which held that David Norgart (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 June 17, 2013. The claimant participated in the hearing. The employer participated through Bill Godden and Sally Brecher.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer did not receive notice for the fact-finding interview until after it received the fact-finding decision so it was denied the opportunity to participate.

The claimant was employed from August 17, 2010 through April 22, 2013 and was most recently working as a full-time assistant manager when he was discharged for violation of the employer's drug and alcohol policy. The employer has a written drug and alcohol policy which prohibits employees from working under the influence of drugs or alcohol. The drug and alcohol policy provides for immediate termination if an employee refuses to take a drug test. The claimant was aware of the employer's drug policy and aware termination would result for refusing to take a drug test.

Manager Bill Godden thought the claimant was acting strangely on April 18, 2013 and called the safety coordinator to the plant. The safety coordinator agreed with the manager's assessment after meeting with the claimant and tried to make an appointment that day for a physical and a drug test based on reasonable suspicion. The medical facility did not have any openings but an appointment was made for the claimant on the following day at 1:00 p.m. The claimant was advised his manager would pick him up for the appointment on Friday, April 19, 2013.

Mr. Godden arrived at the claimant's apartment building at approximately 12:45 p.m. but the claimant did not come outside. Both Mr. Godden and the claimant had company provided cell phones which were supposed to be on at all times. Mr. Godden sent a text to the claimant but he did not respond. Mr. Godden called the claimant but he did not answer and did not return the call. Mr. Godden waited until 1:15 p.m. and finally left when the claimant did not come outside to be taken to his appointment.

The claimant called the employer at 2:30 p.m. and said he overslept. He called the manager a total of three times with approximately 15 minutes in between each call. The claimant wanted to know what he could do to save his job. The employer tried but was unable to schedule an appointment that day. The claimant admitted to his manager he had not made any attempt to go to the doctors on his own to be tested for drugs on April 19, 2013. He was discharged on the following Monday.

The claimant filed a claim for unemployment insurance benefits effective April 21, 2013 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 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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on April 22, 2013 for violating the employer's drug and alcohol policy by refusing to take a scheduled drug test. He was aware of the appointment but did not leave his apartment building to meet his manager in the parking lot. Likewise, the claimant did not answer a text message or the phone call from his manager. His conduct 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. 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 May 8, 2013, 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/pjs