

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN W DUSENBERRY

Claimant

APPEAL NO. 08A-UI-07830-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

MIDWEST JANITORIAL SERVICE INC

Employer

**OC: 07/20/08 R: 04
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Midwest Janitorial Service (employer) appealed a representative's August 27, 2008 decision (reference 01) that concluded John Dusenberry (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 16, 2008. The claimant participated personally. The employer participated by Kim Sayers, Senior Operations Manager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 20, 2002, as a part-time custodian. The claimant signed for receipt of the employer's handbook on March 19, 2002. The employer issued the claimant verbal warnings for failure to follow instructions on June 11 and 20, 2008. On July 3, 2008, the employer issued the claimant a written warning for failure to follow instructions. The employer notified the claimant that further infractions could result in termination from employment. The employer walked the claimant through the area at least four times explaining what was expected from him. The claimant's performance improved for two or three days and then lapsed. The employer continued to receive customer complaints about the claimant's performance.

On July 15, 2008, the claimant failed to complete his sweeping duties, clean the partition and scrub the garage floor. The employer terminated the claimant on July 16, 2008.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer provided evidence of intent at the hearing. The claimant was capable of performing the work properly for two or three days after each reprimand. After that the claimant chose to return to his previous behavior. The employer has met its burden of proof to show misconduct. Benefits are denied.

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 benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's August 27, 2008 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$688.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css