

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM TJARKS
Claimant

APPEAL NO. 10A-UI-09340-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ABM JANITORIAL SERVICES
NORTH CENTRAL INC**
Employer

OC: 05-09-10
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the June 21, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 17, 2010. The claimant participated in the hearing. Dee Hunter, Account Manager; Bethany Landas, Supervisor; and Deniece Norman, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as full-time general cleaner relief worker for ABM Janitorial Services North Central from June 6, 2005 to May 13, 2010. He was discharged for failing three inspections within 180 days. The minimum score allowed on an inspection is 80 percent. Inspections are generally conducted every two weeks, but due to client complaints the employer was inspecting the claimant's work weekly. On February 18, 2010, he received a verbal warning for failing an inspection with a score of 79 percent. On March 4, 2010, he received a written warning for failing an inspection with a score of 70 percent. He was retrained following each warning. On May 10, 2010, the claimant was suspended after an inspection May 7, 2010, when he received a score of 65 percent. The claimant had a checklist and marked off that he completed the quartermaster's room at the Marshalltown Veteran's Home when he entered the room rather than checking off each task as it was done as he was trained to do. The employer can begin its inspection when a room checklist is completed. The claimant had to take his supper break while in the middle of cleaning that room and put his cleaning cart in the supply closet while he ate. The employer asked the claimant if that room was completed and the claimant stated it was and began working on another room. The claimant received scores lower

than 80 percent in the past, but not three within 180 days. Following the suspension, his employment was terminated May 13, 2010.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant failed three inspections within 180 days. He was trained to check off the duties as he completed them rather than right when he walked into the room to be cleaned before he did the tasks, and that practice caught up with him when he indicated he cleaned an entire room but was actually only about halfway done when the employer inspected it. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer.

The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The June 21, 2010, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw