

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH A FOSTER
Claimant

APPEAL NO. 13A-UI-07015-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM LTD
Employer

OC: 05/19/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated June 4, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed from work under non-disqualifying conditions. After due notice was provided, a telephone hearing was held on July 15, 2013. Claimant participated. The employer participated by Mr. Gregg Stearns, Human Resource Manager and Havier Paz, Supervisor.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Joseph Foster was employed by ABM Ltd., doing business as Servicemaster, from August 14, 2006 until May 16, 2013 when he was discharged from employment. Mr. Foster was employed as a full-time day porter assigned to change light bulbs in the 801 Grand Building where the employer had contracted those services. Mr. Foster was paid by the hour. His immediate supervisor was Havier Paz.

Mr. Foster was discharged for failing to follow the assigned schedule of replacing burned out bulbs on specific floors at that local. Mr. Foster was scheduled to check and replace the lighting on different floors each night and was made aware in advance by his supervisor which floors were scheduled to be serviced.

Mr. Foster was warned by his supervisor on May 8, 2013 for not following the required schedule and for his failure to leave many burned out bulbs unchanged.

Mr. Foster was discharged when he again failed to follow the scheduling and change burned out bulbs at the 801 Grand Building, although he had verified to his supervisor that he had done so. When the employer concluded that four of the ten floors assigned to Mr. Foster had not had the

burned out light bulbs changed and the claimant had no reasonable explanation for his failure, the employer concluded that he had been untruthful in the statement about completing his duties and the claimant was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence in the record establishes that Mr. Foster had demonstrated the ability to adequately perform the duties of his job and understood that he was to check and change the lighting on specified floors during each work shift. Mr. Foster received a warning based upon his substantial failure to follow work instructions on May 8, 2013 and was warned and put on notice at that time to follow the employer's reasonable work expectations. The claimant was

discharged when the employer reasonably concluded that Mr. Foster had been untruthful about completing tasks on May 16, 2013 and had not changed the bulbs on four of the ten floors assigned that night.

The administrative law judge concludes for the above-stated reasons that the employer has sustained its burden of proof in establishing that the claimant was discharged under disqualifying conditions. The claimant again failed to perform his duties after being warned a little more than one week before and the claimant had intentionally made untruthful statements to his supervisor. Unemployment insurance benefits are withheld.

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.

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 June 4, 2013, reference 01, is reversed. The claimant was discharged under disqualifying conditions. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten

times his weekly benefit amount and is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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