

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LESTER E MCDANEL
Claimant

APPEAL NO: 12A-UI-10526-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SMITH SEWER SERVICE INC
Employer

OC: 07/22/12

Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Smith Sewer Service, Inc. (employer) appealed a representative's August 23, 2012 decision (reference 01) that concluded Lester E. McDanel (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 September 25, 2012. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Don Smith appeared on the employer's behalf and presented testimony from one other witness, Carol West. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits denied.

FINDINGS OF FACT:

The claimant started working for the employer on September 16, 2010. He worked full-time as a service technician. His last day of work was July 19, 2012. The employer discharged him on that date. The stated reason for the discharge was failing to comply with required drug rehabilitation.

The employer has a written drug testing policy that provides for random drug testing. On June 14 the claimant was selected to be tested. When he was directed to submit for the testing, he declined, indicating that he would test positive. The employer offered the claimant the option to enter drug rehabilitation rather than be discharged for refusal to submit to testing, and the claimant agreed. The cost of the rehabilitation would have been at the claimant's expense. On

June 20 the employer informed the claimant that since the cost of the rehabilitation would be somewhat more than the claimant had anticipated, the employer would cover most of the cost of the rehabilitation, and the claimant would only need to pay \$25.00 per week; the claimant agreed to this arrangement.

On July 18 the claimant informed the employer that he was quitting the rehabilitation, stating that he could not afford it. He was informed that if he quit the rehabilitation, he would be discharged, and he indicated he understood. When the claimant sought to return to work on July 19, he was informed that he was discharged for quitting the therapy.

Some information was presented indicating that, prior to July 19, the employer had been aware of some instances where the claimant had stolen money paid to him in cash by customers for work he had done on behalf of the employer. He had been reprimanded for this. On or about June 6, the employer had learned that this had happened again in a few instances, but the employer did not further address the issue with the claimant at that time. After the separation, the employer learned of some additional more recent instances of reoccurrence.

The claimant established a claim for unemployment insurance benefits effective July 22, 2012. The claimant has received unemployment insurance benefits after the separation.

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 that 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 that 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).

With regard to the thefts known by the employer at the time of the discharge, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). As to instances of theft learned after the separation, those concerns arose subsequent to the decision to discharge the claimant and were not the basis of the employer's decision to discharge the claimant; those concerns cannot now be used to establish misconduct. *Larson v. Employment Appeal Board*, 474 N.W.2d 570 (Iowa 1991). The actual triggering event for the employer's discharge of the

claimant was his announcement that he was quitting the drug rehabilitation that had been agreed to after he had refused to take the random drug test in June.

The claimant's quitting of the drug rehabilitation to which he had agreed in lieu of discharge for refusing to submit to a random drug test 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 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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded the Claims Section.

DECISION:

The representative's August 23, 2012 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of July 19, 2012. 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw