

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARC WHEELER
Claimant

APPEAL NO: 09O-UI-11458-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HRONIK INC
Employer

OC: 05/03/09
Claimant: Appellant (1-R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment
871 IAC 26.14(7) - Late Call
Iowa Code § 17A.12-3 - Non-Appearance of Party

STATEMENT OF THE CASE:

Marc Wheeler (claimant) appealed an unemployment insurance decision dated June 9, 2009, reference 03, which held that he was not eligible for unemployment insurance benefits because he was discharged from Hronik, Inc. (employer), doing business as Whipper Snippers, for work-related misconduct. Administrative Law Judge Terence Nice conducted an initial hearing on this matter in appeal 09A-UI-08791-NT in which benefits were allowed. The employer appealed the decision indicating it did not participate due to lack of notice. The Employment Appeal Board remanded for a new hearing in an order dated August 10, 2009. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 25, 2009. The claimant provided a telephone number but was not available when that number was called for the hearing, and therefore, did not participate. The employer participated through owner Jabe Harper-Hronik. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related 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 contacted the Appeals Section on August 25, 2009, at 8:43 a.m. The record closed at 8:14 a.m. The claimant was busy getting his daughter ready for school and he missed the telephone call because his phone was set on silent. The claimant requested that the record be reopened.

The claimant was employed as a full-time stylist from October 2008 through May 7, 2009 when he was discharged due to inappropriate conduct. The employer's facility specializes in cutting children's hair. Rich Hronik was the claimant's supervisor but he recently passed away so his

wife, Jabe Harper Hronik, participated in the hearing. Mrs. Hronik provided testimony regarding the claimant's separation based on information provided to her by her husband.

The employer received complaints from customers and Mr. Hronik issued verbal warnings to the claimant each time a complaint was received. The claimant sold the highest number of hair products but was rude to customers who were not willing to buy the products. He made a comment to one client about buying products at Wal-Mart Stores, Inc., as if that was a negative act. The claimant questioned one mother as to whether she was a registered nurse since she said her child had a small case of cradle cap. He told a different parent they needed to show "tough love" to their child and once shut off the X-Box game while the kids were getting their hair cut. Three other employees quit because they could not work with the claimant due to his rude behavior and inappropriate comments.

The final incident was when the claimant told a client that if she really loved her child, she would buy them the hair product. Mrs. Hronik happened to receive the telephone call from that parent complaining about what the claimant had said. The employer decided the claimant had to be terminated at that point as its business was suffering because of him.

The claimant filed a claim for unemployment insurance benefits effective May 7, 2009 and has received benefits after the separation from employment.

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REASONING AND CONCLUSIONS OF LAW:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The first issue in this case is whether the claimant's request, to reopen the record after the hearing had concluded, should be granted or denied. If a party responds to a hearing notice after the record has been closed, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c). The request to reopen the record is denied because the party making the request failed to participate by not being available at the telephone number provided.

The substantive issue to be determined in this case 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 § 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 claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on May 7, 2009 for rude and inappropriate treatment towards customers. The employer and his wife had received numerous complaints about the claimant from clients and his actions were having a negative effect on the employer's business. The claimant's 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 June 9, 2009, reference 03, is affirmed. 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