

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT KISSEL
Claimant

APPEAL NO: 13A-UI-06610-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

OMAHA STANDARD INC
Employer

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

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 May 24, 2013, 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 July 16, 2013. The claimant participated in the hearing. Michelle Hawkins, Director of Human Resources and Safety; Ron Moss, Welder; and Tom Kuiper, Employer's Representative, participated in the hearing on behalf of the employer.

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 a full-time lead man for Omaha Standard from March 22, 2006 to May 10, 2013. He was discharged for violating the employer's zero tolerance of violence policy and insubordination.

On May 10, 2013, the claimant was in a hurry to get to the engineer's office to get plans. A group of employees was gathered around the door waiting for the buzzer to go off signaling the start of their lunch hour so they could go through the door for lunch. The claimant walked up to the group and told them to, "Move out of my way. I need to get to the office." The other employees did not move so the claimant walked through the crowd and jerked the door open. In the process of doing so he knocked Welder Ron Moss, an older employee, out of the way, nearly causing him to fall. After thinking about the incident over his lunch break Mr. Moss decided to report the situation to the employer and the employer began conducting an investigation. It took at least four witness statements, all of which indicated the claimant pushed Mr. Moss and one who stated the claimant was "shoving everyone out of the way" in his haste to get through the door. When the employer's investigatory team met with the claimant he was

belligerent and defensive, raised his voice and used profanity. He would not calm down enough for the employer to take his statement because he had heard from other employees he was being discharged for violating the employer's zero tolerance of violence policy. The employer terminated the claimant's employment for his behavior during the meeting and for pushing Mr. Moss out of the way.

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 admitted that he told the employees waiting to go to lunch to "move out of his way" because he needed to get to the office and that in the process of his jerking the door open everyone who was crowded around the door had to move back, which caused Mr. Moss to stumble and almost fall to the ground. While the claimant may have been in a hurry that was no excuse to place other employees in jeopardy by pushing them out of the way on his way to the door and when he opened the door. Additionally,

he was aware his actions nearly caused Mr. Moss to fall as evidenced by the fact he later apologized to him. Finally, when the employer tried to meet with him about his behavior, the claimant was so hostile, belligerent and loud it could not even take his statement about the incident. 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 May 24, 2013, 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/pjs