

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CLINT L FOUSEK
Claimant

APPEAL NO. 10A-UI-3604-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SARATOGA PARTNERSHIP
Employer

**Original Claim: 01/10/10
Claimant: Respondent (2-R)**

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 February 26, 2010, reference 04, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was held on April 20, 2010. The claimant participated personally. The employer participated by Mr. Randy Richter, co-owner. Appearing on behalf of the employer was Mr. Erik Fern, attorney at law. Employer's Exhibits One through Four were received into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Clint Fousek was employed by Saratoga Partnership, a farming and swine producing organization, from February 16, 2009, until January 13, 2010, when he was discharged from employment. Mr. Fousek worked as a swine care employee and general farmhand on a full-time basis and was paid by the hour.

The claimant was discharged after he called in sick and it was discovered that the claimant had not performed a number of required duties as he had previously indicated to his employer. Because the claimant had called in sick, Randy Richter, a facility co-owner, went to perform Mr. Fousek's swine care duties. Mr. Richter found a number of required duties had not been completed, although Mr. Fousek had notated that the duties had been accomplished. Mr. Richter discovered that feeders had not been properly adjusted although Mr. Fousek had indicated on the previous Friday that they had been properly adjusted. The co-owner also noted that the claimant was not wearing required clothing/boots in the swine area as required. Mr. Richter also concluded that the claimant had not been following the required procedure for gaunt or crippled pigs by sorting and penning them to ensure that they had been properly medicated. Mr. Richter found numerous gaunt pigs that had not been reported by Mr. Fousek

and that the claimant was not following procedure that would ensure proper inoculation. A chlorinator that was to be full was empty and had not been maintained as required. In addition, Mr. Richter found that a one-way gate apparatus had not been repaired as Mr. Fousek had indicated.

Based upon these substantial variations from the required procedure, as well as the claimant's failure to inform the employer of the variations, a decision was made to terminate Mr. Fousek from his employment. The employer concluded the claimant's actions jeopardized remuneration that the company would receive, and jeopardized the well-being of the swine .

It is the claimant's position that he was required to perform field work and had been told by other supervisors in the company that "the pigs suffer during fieldwork time."

REASONING AND CONCLUSIONS OF LAW:

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

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 evidence in the record establishes that although Mr. Fousek may have had a reasonable excuse for not performing some duties entrusted to him regarding the care, feeding, and

medication of the swine, he did not follow a reasonable course of action by keeping his employer informed of the deficiencies. Mr. Fousek completed reports and made statements that led the employer to conclude the swine were being properly cared for and that the company's procedures were being followed. When a company co-owner personally visited the facilities, Mr. Richter discovered substantial variations from established procedures and found that a number of required procedures for the care and maintenance of the swine were not being adhered to, although Mr. Fousek's reports to Mr. Richter had indicated otherwise.

Although the administrative law judge is aware that Mr. Fousek was required to perform other duties during this time, the claimant's lack of candor about the care of the swine entrusted to him showed a disregard for his employer's interests or standards of behavior and was disqualifying conduct. Benefits are withheld.

The claimant has received unemployment insurance benefits to which he is not entitled.

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.

The question of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for a determination.

DECISION:

The representative's decision dated February 26, 2010, reference 04, is reversed. The claimant is disqualified. 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, provided he is otherwise eligible. The question of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for a determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw