

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ZACHARY HUSSEY
Claimant

APPEAL NO. 13A-UI-11731-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
PER MAR SECURITY SERVICES
Employer

OC: 09/15/13
Claimant: Respondent (2)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Per Mar Security & Research Corporation (employer) appealed an unemployment insurance decision dated October 10, 2013, reference 01, which held that Zachary Hussey (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 12, 2013. The claimant participated in the hearing. The employer participated through General Manager Nancy Hall and Security Coordinator Rose Willer.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired as a full-time security officer on August 30, 2011 and became the site supervisor at the Great River Health System in July 2013. He was discharged on September 13, 2013 for inappropriately making and publishing social network videos while working. The client contact from the Great River Health System informed the general manager on September 11, 2013 that the claimant had been making videos of himself while working at the hospital. He posted these videos on the internet on a social network site called Vine. The claimant admitted making these videos and acknowledged that they might be inappropriate but does not understand why he was fired without a prior disciplinary warning. He testified that in some of the videos, he was on the work site and in the employer's uniform but was not actually on the clock at the time the videos were made.

The employer conducted an investigation and has some of the videos but they were not provided for the hearing. The employer did play two videos during the hearing so the sound was recorded even though the videos could not be seen. In each of the videos, the claimant

can be seen at the hospital wearing the employer's uniform. One video, which was played at the hearing, has the claimant on or near the Hospice Unit of the hospital where he loudly stated, "See if we can liven up the Hospice. Look alive people!" After the comment, the claimant ghoulishly laughs.

In another video, the claimant states, "This is what you do when you're bored at work". He is sitting behind a desk at the hospital wearing the Per Mar uniform and it appears that he is "hacking off" as the employer labeled it. His hand was moving up and down quickly under the desk so only his arm could be seen moving and he had a "funny" look on his face. The claimant admitted that it looked as if he were masturbating because the toy he was shaking was making sounds but denies that he intended to make it look that way. On this or a separate video, the claimant can be heard saying, "What the fuck! Where is everybody – crazy ass wild party at the hospital!"

There is another video in which he is filming a helicopter landing at the hospital and a fourth video in which the employer testified the claimant was filming himself while driving the employer's vehicle. The claimant admits he took both videos but contends that the vehicle was parked at the time he filmed himself. The employer initially suspended the claimant and demanded he remove the videos from the website, which he did. The client wanted the claimant removed from its facility and the employer removed the claimant from its company as well. The employer continues to be shocked by the claimant's actions.

The claimant filed a claim for unemployment insurance benefits effective September 15, 2013 and has received benefits after the separation from employment in the amount of \$2,478.00.

REASONING AND CONCLUSIONS OF LAW:

The issue 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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 13, 2013 for inappropriately making and publishing social network videos while working. Even though he had not received previous disciplinary warnings, his actions were serious enough to warrant termination on the first offense. And while the employer only recently became aware of the claimant's actions, he testified that he had done this repeatedly. The claimant does not appear to appreciate the seriousness of his actions but it seems that any reasonable person would know activity like this would not be condoned. 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.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not

otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because both parties participated in the fact-finding interview. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$2,478.00.

DECISION:

The unemployment insurance decision dated October 10, 2013, reference 01, is reversed. 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 claimant was overpaid benefits in the amount of \$2,478.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css