

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

TIM M GREEN  
5713 FRANKLIN AVE  
DES MOINES IA 50310-1033

OVERNITE TRANSPORTATION CO  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-04850-RT  
OC: 12/25/05 R: 02  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Overnite Transportation Company, filed a timely appeal from an unemployment insurance decision dated April 25, 2006, reference 02, allowing unemployment insurance benefits to the claimant, Tim M. Green. After due notice was issued, a telephone hearing was held on May 22, 2006, with the claimant participating. The claimant was represented by Don Green, the claimant's father. Mike Aastrup, Service Center Manager in Des Moines, Iowa, where the claimant was employed, participated in the hearing for the employer. The employer was represented by Doretha Washington of TALX UC eXpress. Employer's Exhibit One was

admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time pickup and delivery driver driving a semi-tractor trailer, from January 2, 2003, until he was initially discharged on January 5, 2006 for too many preventable accidents and then rehired on February 6 or 7, 2006 and finally discharged on March 28, 2006 for an additional preventable accident including all the prior preventable accidents.

The accident that triggered the claimant's discharge occurred on March 27, 2006. At that time the claimant was at a customer's location and was attempting to pull his semi-tractor trailer forward in a close situation. The claimant began to pull forward but realized that he was not going to make it turning that way so backed back and then pulled out turning the other way. Although the claimant testified that he could not see the entire trailer through his side view mirror, the claimant did not look out the window from which he could have seen the entire left side of the trailer and the claimant had no reason for not doing so. The claimant also did not get out of the truck and look at the right side of the trailer to see if anything was impeding his progress but had no reason for not doing so. The claimant conceded that he should have done both. In any event, the claimant struck a truck of the customer causing damage to that truck. The claimant did not report this accident because he knew he would be discharged for that accident. The customer called and explained to the employer that he thought the claimant's truck had struck one of their trucks. The customer had a surveillance tape. The employer's witness, Mike Aastrup, Service Center Manager in Des Moines, Iowa, where the claimant was employed, went out to the customer's location and viewed the surveillance tape and saw the claimant operating a semi-tractor trailer which did strike the customer's truck. He saw the customer's truck rock back and forth after the claimant struck the truck but did not notice if the claimant's trailer or tractor moved in any unusual fashion. Mr. Aastrup went back to the employer's location and confronted the claimant who eventually admitted that he had struck the customer's truck. The claimant was then suspended pending an investigation into the accident.

In 2005 the claimant had had three preventable accidents on June 17, 2005; September 21, 2005; and October 31, 2005. All parties agree these were preventable. On December 16, 2005, the claimant had a fourth accident in which he hit a patch of black ice. The employer determined that that was preventable and discharged the claimant. However, during a peer review process, the claimant was allowed to be rehired providing he had no more preventable accidents. The employer has a policy or rule that provides for discharge when an employee has three preventable accidents in one year. The administrative law judge concludes that the accident on December 16, 2005 was probably preventable since the claimant was driving a truck with ice on the road and should have driven appropriately given the road conditions. In any event, after the claimant's discharge and before his rehire he filed for unemployment insurance benefits and was initially denied benefits but by a decision by another administrative law judge dated February 2, 2006, the initial decision was reversed and the claimant was allowed benefits because the accident on December 16, 2005 was not preventable as determined by the administrative law judge. The administrative law judge did determine that the claimant had three preventable accidents prior to that time.

The claimant receive a written warning after each of the accidents and in addition a final written warning on November 12, 2005 informing him that another preventable accident would result in his discharge. Pursuant to his claim for unemployment insurance benefits filed effective December 25, 2005, and reopened effective March 26, 2006, the claimant has received unemployment insurance benefits, since his discharge on March 28, 2006 and since reopening his claim effective March 26, 2006, in the amount of \$2,353.00 as follows: \$85.00 for the benefit week ending April 1, 2006 (earnings \$320.00) and \$324.00 per week for seven weeks from the benefit week ending April 8, 2006 to the benefit week ending May 20, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

- (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

871 IAC 24.32(9) provides:

- (9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when he resigned in lieu of an investigation while suspended. The claimant maintains that he was discharged. The administrative law judge concludes that there is not a preponderance of the evidence that the claimant voluntarily left his employment or was deemed to have voluntarily left his employment. The evidence establishes that on March 28, 2006 the claimant was certainly suspended. When a claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged and the issue of misconduct must be resolved. The administrative law judge concludes that the claimant would have been discharged following his suspension. The administrative law judge further concludes that although the claimant was not specifically told that he was discharged on March 28, 2006, the claimant was fully aware that he would be discharged and, therefore, the administrative law judge concludes that the claimant was essentially compelled to resign or be discharged and this is not a voluntary leaving. It is clear that the claimant was discharged once for his accidents and was told that if he had another one he would be discharged. The claimant had another one and believed he would be discharged and this belief was justifiable and the employer even conceded that the claimant would probably have been discharged. Accordingly, the administrative law judge concludes that the claimant was discharged on March 28, 2006.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only reason for the claimant's discharge was his accidents. At the outset, the administrative law judge concludes that the claimant's accidents were not deliberate acts or omissions constituting a material breach of his duties nor do they evince a willful or wanton

disregard of the employer's interests and are therefore not disqualifying misconduct for those reasons. However, the administrative law judge is constrained to conclude that the claimant's accidents were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The evidence is clear and uncontroverted that the claimant had three preventable accidents on June 17, 2005; September 21, 2005; and October 31, 2005. The evidence is also uncontroverted that the employer has a rule or policy that provides for discharge when an employee has three preventable accidents in a year. The administrative law judge concludes that such preventable accidents are as a result of the claimant's carelessness or negligence. The administrative law judge believes that the accident on December 16, 2005 was also preventable but even assuming that it was not, the administrative law judge concludes that the claimant's final accident on March 27, 2006 was preventable and again as a result of the claimant's carelessness and negligence. The claimant conceded that he should have, and could have, looked out the drivers side window to see the left side of his trailer and get out of the tractor to check the right side of the trailer. The claimant was well aware that the employer was concerned about his driving having received warnings for each of his accidents and in addition a final warning on November 12, 2005 and then being once discharged in January of 2006 for his accidents and then being rehired and told that if he had another accident he would be discharged. The claimant was not careful on March 27, 2006 and as a result of his negligence or carelessness, the claimant had a fourth preventable accident which would have been within one year. Accordingly, the administrative law judge concludes that the claimant's accidents were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount \$2,353.00 since separating from the employer herein on or about March 28, 2006 and reopening his claim for benefits effective March 26, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with provisions of Iowa law.

DECISION:

The representative's decision of April 25, 2006, reference 02, is reversed. The claimant, Tim M. Green, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$2,353.00.

cs/pjs