

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBERT D HEGLAND
Claimant

APPEAL NO. 09A-UI-07149-SW

**ADMINISTRATIVE LAW JUDGE
DECISION**

CITY OF DAVENPORT
Employer

OC: 04/05/09
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated April 27, 2009, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A hearing was held on October 5, 2009. The parties were properly notified about the hearing. The claimant participated in the hearing with his representative, Earl Payson, Attorney At Law. Brian Heyer participated in the hearing on behalf of the employer with witnesses, Dale Sievert, Frank Donchez, and Steve Schneider. Exhibits One through Ten and A were admitted into evidence at the hearing.

ISSUES:

Was the claimant discharged for work-connected misconduct?

Was the claimant overpaid unemployment insurance benefits?

FINDINGS OF FACT:

The claimant worked full time as a police officer for the employer from March 21, 1994, to March 17, 2009. The claimant was informed and understood that under the employer's work rules, a police officer cannot change a traffic ticket issued by another officer into a warning ticket without the issuing officer's permission.

On April 12, 2008, Police Officer Sam Jett issued a speeding ticket to Michelle Smith.

On April 15, 2008, Michelle's husband, Cory Smith, who was a information technology employee with the city approached the claimant asking whether anything could be done about Michelle's speeding ticket. Later that day, the claimant went into the computer system and changed the citation from a speeding ticket to a warning ticket and deleted the speeding ticket. He did not notify or receive permission from Jett in willful violation of the employer's policies. He copied Jett's signature and Michelle Smith's signature so that it appeared that Jett had issued a warning ticket to Smith.

At February 2009, Jett was asked about warning ticket he had issued in April 2008. Jett never issues warning tickets and brought this changed ticket to his supervisor's attention. An investigation began at the end of February to discover who was responsible for changing the ticket. The employer discovered the connection between Michelle and Cory Smith; Smith implicated the claimant.

On March 3, 2009, the claimant was questioned by an internal affairs officer and denied changing the ticket. He admitted he knew that a ticket could only be changed with authorization of the issuing officer. As a result of the subsequent investigation that included interviews of Cory Smith and Sam Jett, the employer determined the claimant had changed the ticket without authorization, had placed false information on a public record by changing the ticket, and was untruthful in denying he had changed the ticket. He was discharged for these reasons on March 17, 2009.

The claimant filed for and received a total of \$2,723.00 in unemployment insurance benefits for the weeks between April 5 and June 27, 2009.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. I have carefully listened to the audio recording of the name-clearing hearing during which the claimant admitted that he had entered the TRACS system and changed Michelle Smith's speeding ticket to a warning. He claimed to have forgotten doing it, but I do not believe this claim is credible.

The claimant's conduct was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

The final question is whether the claimant was discharged for a current act of work-connected misconduct based on changing the ticket on April 15, 2008, when he was discharged almost a year later.

871 IAC 24.32(8) provides: "While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act."

Viewed simplistically, one could conclude that any act occurring several months or in this case eleven months before a discharge cannot be a current act. Using this analysis, a dishonest employee who successfully conceals an act from management would not be subject to disqualification if management later discovers the dishonesty several months later. The only logical interpretation of the rule is that it prevents an employer from using past acts of misconduct of which the employer was aware as the grounds for a discharge some time later.

This view is supported by the Iowa Court of Appeals' interpretation of this rule in *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988). In *Greene*, the court ruled that to determine whether conduct prompting the discharge constitutes a disqualifying current act, the decision maker must consider the date on which the conduct came to the employer's attention and the date on which the employer notified the employee that the conduct provided grounds for dismissal. Any delay in taking action must have a reasonable basis. *Id.* at 662.

Using this reasoning, the employer discovered the problem with the changed ticket in late February but did not identify the claimant as a suspect until early March 2009. They conducted a prompt investigation, including interviews with the claimant and the other key persons involved in the incident before discharging the claimant on March 17, 2009. This satisfies the requirements of the *Greene* case and the changing of the ticket involved a current act of misconduct. Additionally, I found the claimant was untruthful in denying changing the ticket in the interview on March 2, 2009. This dishonesty would clearly amount to a current act.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding.

The unemployment insurance law requires benefits to 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 § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

DECISION:

The unemployment insurance decision dated April 27, 2009, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise

eligible. The matter of deciding the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded to the Agency.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css