

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAYCE E CHRISTIANSEN
Claimant

APPEAL NO. 09A-UI-18980-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARRY'S FARM TIRE INC
Employer

OC: 11-29-09
Claimant: Respondent (2R)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 14, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 28, 2010. The claimant did participate. The employer did participate through Nick Jacobson, Manager.

ISSUES:

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a shop technician full time beginning September 13, 2008 through November 20, 2009 when he was discharged.

The claimant was a tire and oil technician. He worked in the shop and was also required to make service calls primarily to local farms. In June 2009 he told Mr. Jacobson that he was afraid to work on the large combine or tractor tires by himself on service calls to farms. The claimant admits that Mr. Jacobson never told him he that he would not have to perform service calls. On November 20 the claimant performed a service call where he went out and changed some tires on a trailer on a road. The employer was extremely busy that day and the other service technicians were out on calls when a call came in to have two wagon tires changed on some farm equipment. The tires that needed to be changed were not the large combine or tractor tires, but were tires on a wagon. The claimant had previously changed tires like or very similar to the ones Mr. Jacobson was instructing him to go change. The claimant was not being asked to perform any unsafe or unlawful activity. The claimant told Mr. Jacobson that he would not go out on the service call. The claimant admits that Mr. Jacobson never promised him that he would get to pick and chose which service calls her performed, nor was the claimant ever guaranteed that he would not have to work farm tires. The claimant refused to perform the service call and was discharged for his refusal to perform the required service call.

The claimant has received unemployment benefits since filing a claim with an effective date of November 29, 2009.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code § 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 question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985). Generally, continued refusal to follow reasonable instructions constitutes misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The claimant admits that he was not allowed to pick and chose which tasks or service calls he would perform. The employer was within their right to ask him to perform a service call at a farm to change two wagon tires. The claimant's own preference that he did not like those type of service calls is not good cause for refusing to perform the assigned task. The employer was not asking the claimant to perform an illegal or unsafe task. The claimant had a demonstrated ability to make service calls as he had in the past and had performed another service call earlier

in the day. There was no agreement on the part of the employer that the claimant would not have to perform farm service calls. Under these circumstances, the claimant's own preference that he not go to the farms, is not good or reasonable cause for refusing to perform the assigned service call. Claimant's failure to perform the service call and to adequately and fully perform his job duties after having established the ability to do so is evidence of his willful intent not to do so and is misconduct. Benefits are denied.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. 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 § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The December 14, 2009, 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 is overpaid benefits in the amount of \$2,376.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css