

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANE D SMITH
Claimant

APPEAL NO. 12A-UI-08038-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

PHOENIX CLOSURES INC
Employer

OC: 06/10/12
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Phoenix Closures, filed an appeal from a decision dated June 28, 2012, reference 01. The decision allowed benefits to the claimant, Shane Smith. After due notice was issued, a hearing was held by telephone conference call on July 30, 2012. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Office Manager Linda Humphrey and Supervisor Brandon Adams and was represented by Unemployment Consultants in the person of Bob Gabrielson.

ISSUE:

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

FINDINGS OF FACT:

Shane Smith was employed by Phoenix Closures from February 27, 2008 until May 31, 2012 as a full-time mold technician. Employees are required to lock-out/tag-out machines when they are working on them to prevent injury or death to themselves or other employees. In April 2012, the employer changed the policy to one of zero tolerance. Any employee who does not lock-out/tag-out a machine is subject to immediate discharge. This announcement was made in writing in a notice attached to the pay checks of all employees, it was discussed in staff and safety meetings, and the notice was posted on the bulletin board.

On May 31, 2012, Supervisor Brandon Adams saw the claimant working on a roller die machine and the "lights were still blinking," which meant the power had not been turned off. He notified Mr. Smith to stop working on the machine immediately and go get the necessary locks and tags and install them before he worked on the equipment again. He then notified Production Manager Terry Deroin and together they consulted with Office Manager Linda Humphreys.

Mr. Smith was brought into the office, where he was questioned about the failure to lock-out/tag-out. He admitted he had not done so and also acknowledged he was aware of the policy and that it was zero tolerance. He was discharged for failing to follow the company policy.

Shane Smith has received unemployment benefits since filing a claim with an effective date of June 10, 2012.

REASONING AND CONCLUSIONS OF LAW:

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 claimant had been advised the failure to log out/tag out had become zero tolerance at least a month before he violated the policy. This is an important safety procedure, as it prevents employees from harming themselves or others by turning off and locking the power source on any machine which they are servicing. The employer has the obligation to provide a safe and harassment-free work environment for all employees and the claimant's conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of June 28, 2012, reference 01, is reversed. Shane Smith is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw