

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TONY L HERTRAMPF
Claimant

LIVESTOCK EXPRESS INC
Employer

APPEAL NO: 11A-UI-00927-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/05/10
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated January 18, 2011 reference 01 that held the claimant was not discharged for misconduct on December 2, 2010, and benefits are allowed. A telephone hearing was held on February 22, 2011. The claimant did not participate. Art Perry, HR Director, and Kerry Able, Transportation Manager, participated for the employer. Employer Exhibits A thru E was received as evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on July 12, 2010 as a full-time driver, and last worked for the employer on December 2, 2010. The claimant received an employee handbook that contains the employer policy. One policy provides that a refusal to perform may result in employment termination.

The claimant was issued a written warning on November 10, 2010 for refusing to obey an instruction regarding the delivery of a load based on a November 3 incident. The employer put claimant on notice he could be discharged for any further incident of this nature. The claimant signed for the warning.

Manager Perry directed claimant to make a delivery for December 2/3. Later, Perry received a message the claimant had failed to show-up for the delivery. Perry had to call another driver to make the pick-up in Wisconsin that had been scheduled for claimant. Perry couldn't reach claimant after making several calls. The other driver reported claimant showed-up, and Perry instructed him to load and have the claimant wait for his call. Claimant told the other driver he had overslept and wouldn't wait for the call. Claimant abandoned his truck.

The claimant has received benefits on his current claim.

REASONING AND CONCLUSIONS OF LAW:

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 administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on December 3, 2010.

The employer gave claimant a warning about his failure to follow dispatch instructions in making loads, and put him on notice a further incident could result in termination. It appears the claimant overslept in failing to arrive on time for an out-of-state delivery that caused the employer to send another driver, because the claimant could not be contacted and he failed to let the employer know about what happened. The substitute driver was there for the load when claimant arrived, so he was given the load, and the claimant disobeyed his manager instruction to wait for a call by when he abandoned his truck. The claimant's recent mis-deeds in light of the prior warning constitutes job disqualifying misconduct.

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.

Since the claimant has received benefits on his current claim, the overpayment issue is remanded to claims for a decision.

DECISION:

The department decision dated January 18, 2011, reference 01, is reversed. The claimant was discharged for misconduct on December 3, 2010. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs