

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID S WARNER
Claimant

APPEAL NO. 11A-UI-07327-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VAN DIEST SUPPLY CO
Employer

**OC: 04/17/11
Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Van Diest Supply Company (Van Diest), filed an appeal from a decision dated May 27, 2011, reference 01. The decision allowed benefits to the claimant, David Warner. After due notice was issued a hearing was held by telephone conference call on June 27, 2011. The claimant participated on his own behalf. The employer participated by Personnel Manager Carolyn Cross, Director of Support Services Mark Davis, Vice President of Manufacturing Lee Trask and was represented by Jeff Crouseman. Exhibit One was admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

David Warner was employed by Van Diest from June 15, 2009 until April 13, 2011 as a full-time shipping and receiving operator. He had received written warnings September 21, 2010 and January 18, 2011, for errors in the performance of his job. The follow up letter of January 20, 2011, notified him his job was in jeopardy. The letter further admonished him to take adequate time to perform his job duties properly.

On April 13, 2011, he was operating a tractor/trailer on the premises. He ran it into a barricade around an electrical unit, damaging the barricade and the trailer. It was reported by Mr. Warner's supervisor Jason Steuerwald to Vice President of Manufacturing Lee Trask.

Mr. Trask interviewed Mr. Warner about the accident and then consulted with the personnel department to review his prior discipline. The decision was made to discharge based on three incidents of carelessness in performing his job duties in the past seven months.

David Warner has received unemployment benefits since filing a claim with an effective date of April 17, 2011.

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 claimant was discharged for three substantial errors in the performance of his job duties in less than a year. The employer has the right to expect employees to work to perform their job duties with due diligence and caution. While mistakes may be made, employees are expected, and Mr. Warner was warned, to take adequate time to be sure the job is performed correctly.

The final incident was an accident which resulted in damage to company property while the vehicle was in the sole control of the claimant. Errors of such a degree of recurrence are considered misconduct under the provisions of the above Administrative Code section. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

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.

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 May 27, 2011, reference 01, is reversed. David Warner is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, 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/pjs