

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHRISTOPHER D LAUMBACH**  
Claimant

**APPEAL NO. 12A-UI-01248-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AVENTURE STAFFING & PROFESSIONAL**  
Employer

**OC: 08/28/11  
Claimant: Respondent (2R)**

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

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated January 27, 2011, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 2, 2012. Claimant participated. The employer participated by Kayla Neuhalfen, human resources representative, and Gail Anderson, branch manager. The record consists of the testimony of Kayla Neuhalfen; the testimony of Gail Anderson; the testimony of Christopher Laumbach; and Employer's Exhibits 1-18.

**ISSUES:**

Whether the claimant was discharged for misconduct; and  
Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a temporary staffing agency. The claimant accepted an assignment on October 13, 2011, to work at the Pioneer Hybrid plant in Aurelia, Iowa. The claimant was a general laborer and fork lift driver. The job was a full-time job. The claimant's last day of work was December 16, 2011. He was terminated on December 16, 2011.

The incident that led to the claimant's termination occurred on December 16, 2011. The claimant was operating a sweeper and hit a pole. Pioneer Hybrid personnel were aware of the incident and informed the employer. The employer waited for the claimant to report the incident. The employer has a written policy, of which the claimant was aware, that all incidents were to be reported as soon as possible. This was also the policy of Pioneer Hybrid. The claimant did not report the incident. Pioneer Hybrid requested that the claimant be taken off the assignment. The employer decided to terminate the claimant for failing to report the incident. The employer had given the claimant three hours after the incident to report it.

The claimant had two previous incidents where he also failed to report. The first was on October 28, 2011, and resulted in a written warning. (Exhibit 5) The second incident occurred on November 16, 2011, where the claimant hit a pole with a motorized vehicle. The claimant was informed that he must report when these incidents occur. There were very strict safety rules in place. On December 6, 2011, the claimant attended a meeting where incident reporting was the subject.

The employer elected to terminate the claimant after the third incident where he failed to report. The claimant was informed of his termination by Gail Anderson, branch manager.

### **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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer has the burden of proof to show misconduct.

The evidence in this case showed that the claimant was terminated after an incident that occurred on December 16, 2011. He hit a pole with a sweeper and did not report the incident. He had been assigned to work at a plant that had very strict safety rules. One of these rules was that any incident must be reported. The claimant knew this was a requirement of his job. He had employee handbooks that set forth this policy. He had been warned and told that this was the policy and he attended a meeting on December 6, 2011, where the policy was explained. Despite this knowledge, the claimant had three separate instances where he hit something with motorized equipment and he failed in each instance to report the incident. The claimant's failure to report was deliberate and the pattern of conduct shows insubordination. This is misconduct. Benefits are therefore denied.

The next issue is overpayment of benefits.

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 overpayment issue is remanded to the claims section for determination.

**DECISION:**

The decision of the representative dated January 27, 2012, reference 02, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the claims section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs