

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIAN EIBEN
Claimant

APPEAL NO: 08A-UI-10398-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STARK ENTERPRISES INC
Employer

OC: 07/06/08 R: 03
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Start Enterprises, Inc. (employer) appealed an unemployment insurance decision dated October 28, 2008, reference 04, which held that Brian Eiben (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 20, 2008. The claimant participated in the hearing. The employer participated through Bridget Casey, Operations Manager. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time laborer from February 20, 2008 through September 23, 2008. He had issues with absenteeism and the employer switched him to the night shift in order to accommodate him. The claimant did not have a driver's license so had to depend on other people and he reported it would be easier to start at 4:30 p.m. but it did not seem to make any difference. He received a warning on June 23 for tardiness, a warning on June 27 for a no-call/no-show and a warning on July 2 for a no-call/no-show. The claimant was placed on probation for his issues with attendance. He was late for work on September 22, 2008 and another warning was prepared for him but he never returned to work after that date to sign it. The claimant called his supervisor on September 23, 2008 at approximately 4:00 p.m. and said he would not be at work. Supervisor Fred Tobin told him he needed to be there at 4:30 p.m. or a replacement would be found. The claimant became angry and said, "Fuck off you son of a bitch'n mother fucker!" Mr. Tobin told the claimant he could not speak to him that way and needed to find a ride to work. Mr. Tobin disconnected only to receive another call from the claimant at 4:15 p.m. asking why he had been fired. Mr. Tobin told the claimant he had not fired him but if he failed to show up for work on probation, it would be grounds for termination.

The claimant responded with the statement that Mr. Tobin was not shit and the claimant would "kick his bitch ass" if he ever saw Mr. Tobin again. Mr. Tobin again told the claimant he could not talk to him like that and the claimant said, "Well consider me done then and fuck you and Stark's!" The claimant did not report to work and was discharged as a result.

The claimant filed a claim for unemployment insurance benefits effective July 6, 2008 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for insubordination and excessive unexcused absenteeism. An employer has the right to expect decency and civility from its employees and an employee's use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct

disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). The claimant's use of profanity towards his supervisor on September 23, 2008 was sufficient to result in his disqualification from unemployment insurance benefits. However, he is also disqualified as a result of excessive absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated October 28, 2008, reference 04, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs