

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID R MARCUSSEN

Claimant

APPEAL NO. 10A-UI-14808-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DECKER TRUCK LINE INC

Employer

OC: 09/26/10

Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Decker Truck Line, Inc. (Decker), filed an appeal from a decision dated October 22, 2010, reference 02. The decision allowed benefits to the claimant, David Marcussen. After due notice was issued a hearing was held by telephone conference call on December 14, 2010. The claimant participated on his own behalf. The employer participated by Assistant Human Resources Director Courtney Bechel, Terminal Director Chuck Harman and was represented by Jennifer Smith. Exhibits One, Two, Three, Four, Five, were 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 Marcussen was employed by Decker from October 13, 2008 until September 27, 2010 as a full-time mechanic. During the course of his employment he received warnings regarding being under the influence of alcohol while at work as well as complaints from drivers about his work and poor work performance. The final warning was given on December 4, 2009, and it notified him his job was in jeopardy if there were any further violations of company rules.

On September 26, 2010, the claimant arrived at work around 7:30 p.m. and called Terminal Manager Chuck Harman. He notified Mr. Harman he was giving his two-week notice and was loading his tools into his truck and would work "out of his truck" for the next two weeks. Mr. Harman thought the claimant might be under the influence of something because his speech was slurred and he was "rambling" and incoherent. After hanging up he called Maintenance Director Jeff Gallogly and they discussed what had just happened. Mr. Gallogly suggested the terminal manager come into the shop which he did, arriving around 8:00 p.m.

The manager saw Mr. Marcussen loading his tools into his personal truck which was inside the shop. The claimant was trying to secure a tarp on his truck and was very unsteady on his feet, uncoordinated and unfocused. Mr. Harman helped him secure the tarp and suggested that

someone else give the claimant a ride home because he was intoxicated. Mr. Marcussen refused saying he would need his truck the next day and the manager said he would drive the claimant home in his truck and someone could come and give him a ride back to the terminal. Mr. Harman refused to allow the claimant to do the lot check because he was intoxicated and Mr. Marcussen did admit to drinking before he came on duty. He was sent home at that time.

The next day Mr. Marcussen discussed the incident with Human Resources Director Brenda McNealey and Mr. Gallogly. The decision was made to discharge the claimant and he was notified of this when he arrived for work that afternoon. He was specifically told he was fired for being under the influence of alcohol while at work in violation of company policy, and he did not deny it.

David Marcussen has received unemployment benefits since filing a claim with an effective date of September 26, 2010.

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 his job was in jeopardy as a result of his violation of company rules and policies. The final incident was being at work under the influence of alcohol which is strictly prohibited by company policy. 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 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 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 October 22, 2010, reference 02, is reversed. David Marcussen 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/css