

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RICHARD J DAVIS**  
Claimant

**APPEAL NO. 10A-UI-10785-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CITY OF IOWA CITY**  
Employer

**OC: 07/04/10**  
**Claimant: Respondent (2R)**

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

**STATEMENT OF THE CASE:**

Employer filed an appeal from a decision of a representative dated July 28, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on November 8, 2010. Claimant participated. Employer participated by Molly Trenary, personnel generalist; Jenny Clarahan, investigator – Iowa City Police Department; and Chris O'Brien, director of transportation services. The employer was represented by Sarah Holecek, city attorney. The record consists of the testimony of Molly Trenary; the testimony of Jenny Clarahan; the testimony of Chris O'Brien; the testimony of Richard Davis; Claimant's Exhibits A-D; and Employer's Exhibits 1-10.

**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 municipality located in the state of Iowa. The claimant was hired on March 8, 2006. His last day of work was June 30, 2010. He was terminated on June 30, 2010. At the time of his termination, he was a maintenance worker II for the transportation services department. He was a full-time employee. The claimant was terminated because it was found that he had falsified his employment application.

If an individual wants to work for the employer, he or she fills out an application either in person or on-line. The application is then reviewed and an Iowa background check is conducted. When a department head requests that a position be filled, the department head also provides a list that contains criminal activities that would disqualify an individual for that position. This means that if an individual who wants a job with the city has a criminal background, that background may disqualify him or her from certain positions. The transportation department

disqualifies individuals with violent felonies and theft convictions. Employees of the transportation department serve as cashiers at parking ramps and empty parking meters. Because employees handle large amounts of cash, a theft conviction will disqualify an individual from working for the transportation department.

One of the questions on the application that claimant filled out stated: "Have you ever pled guilty to (including an Alford plea) or been convicted of a crime other than a traffic related simple misdemeanor in the last twelve (12) years? " The claimant marked the no box with an x. (Exhibit 7)

The claimant had been convicted of a misdemeanor theft charge in Oregon. He pled guilty and a conviction was entered on March 4, 2002. The claimant did not disclose this information when he filled out the application with the employer. This conviction would have disqualified him from receiving a job with the employer.

The misrepresentation was discovered by the employer when a police investigator, Jenny Clarahan, started investigating a report of theft made at a Hy-Vee store in Iowa City. Hy-Vee informed the police department that it suspected that the claimant, who was employed at the store, had been taking bottle vouchers from the office and using them to obtain cash or purchase groceries. The claimant was terminated by Hy-Vee. Ms. Clarahan, as part of her investigation, discovered the theft conviction in Oregon. Ms. Clarahan contacted the claimant. She asked the claimant if she could interview him. He did not agree to an interview and deferred to his attorney, who instructed Ms. Clarahan not to have further contact with the claimant. Meanwhile, the claimant's supervisor, Chris O'Brien, and the human resources manager, Karen Jennings, were informed about the theft at a meeting on June 30, 2010. Since the claimant had failed to disclose the conviction on his application, he was terminated.

#### **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 section 96.5-2-a.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was discharged for providing false information on his employment application. When a person willfully and deliberately makes a false statement on an employment application, such falsification shall be an act of misconduct in connection with the employer. The statement need not be written and an omission of a pertinent fact would have the same effect. The falsification must be such that it does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy. 871 IAC 24.32(6).

The Iowa Supreme Court has stated that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570, 571 (Iowa 1991). While this statement is dicta since the court ultimately decided Larson was discharged for incompetence not her deceit on her application, the reasoning is persuasive. The court does not define materiality but cites Independent School Dist. v. Hansen, 412 N.W.2d 320, 323 (Minn. App. 1987), which states a misrepresentation is not material if a truthful answer would not have prevented the person from being hired.

In the case herein, the employer witnesses testified the claimant would not have been hired if he had been honest on his application. A theft conviction would have disqualified the claimant from receiving a job with the transportation department due to the large amounts of cash he would have been handling. Consequently, the claimant's misrepresentation on his employment application was materially related to his job performance and results in his disqualification. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

The next issue is overpayment of benefits.

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 overpayment issue is remanded to the claims section for determination.

**DECISION:**

The decision of the representative dated July 28, 2010, reference 01, 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