

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

DAN T SMITH
Claimant

APPEAL NO: 06A-UI-08267-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN GAMES INC
Employer

**OC: 07/16/06 R: 01
Claimant: Respondent (2)**

Section 96 5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

American Games, Inc. (employer) appealed an unemployment insurance decision dated August 10, 2006, reference 01, which held that Dan Smith (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 August 31, 2006. The claimant participated in the hearing. The employer participated through Kari Hockemeier, Human Resources Manager and Alyce Smolsky, Employer Representative. Employer's Exhibit One was admitted into evidence. Based on the evidence, the arguments of the parties, 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 claimant was discharged for disqualifying 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 part-time order puller for this charitable gaming company from October 10, 2005 through May 31, 2006, when he was discharged. Since the employer contracts with the states of Michigan, Iowa and Nebraska, the employer is guided by these particular state requirements. In May 2006, the State of Michigan conducted an audit of the employer and all employees had to complete a disclosure of information and authorization to release criminal history information. Employees were advised to list all criminal convictions and if unsure whether to list a conviction, they were to include it. Failure to disclose a conviction would be cause for disqualification from employment. The claimant completed this form on May 12, 2006 and certified that he only had a 2005 possession charge and a charge of driving without a license. When the criminal records check from Nebraska was returned, it showed the claimant also had a fugitive from justice charge and a charge of no proof of insurance. Had the claimant honestly disclosed his criminal record, he could have continued employment.

The claimant filed a claim for unemployment insurance benefits effective July 16, 2006 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 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 from employment for failure to disclose his criminal history on a form filled out on May 12, 2006 and certifying that the information was truthful and accurate. His explanation for failing to disclose his complete criminal history was that he did not think he needed to include it since it all stemmed from his

possession charge. However, the form advised individuals to list a conviction even if the person was unsure as to whether or not to include it. The form further provided that failure to disclose criminal charges would result in disqualification of employment. The claimant's failure to disclose his criminal history was a substantial disregard of the standards of behavior the employer had the right to expect of the claimant.

The final issue to address is whether the claimant was discharged for a current act. 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. 871 IAC 24.32(8). The claimant was discharged approximately one month after completing the disclosure form and was discharged after the Nebraska records were returned to the employer, which is the first the employer became aware of the claimant's false certification. Consequently, the discharge is based on a current act. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated August 10, 2006, reference 01, 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 claimant is overpaid benefits in the amount of \$1,818.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs