

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**RUSTY SMALLEY
327 NORTH ELK RUN RD
WATERLOO IA 50703-9473**

**GRAY TRANSPORTATION INC
PO BOX 2365
WATERLOO IA 50704**

**Appeal Number: 06A-UI-06607-BT
OC: 06/04/06 R: 03
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Gray Transportation (employer) appealed an unemployment insurance decision dated June 22, 2006, reference 01, which held that Rusty Smalley (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 July 17, 2006. The claimant participated in the hearing. The employer participated through Darrin Gray, President; Leroy Gray, CEO; and Jan Etringer, Vice-President of Operations. Employer's Exhibit One was admitted into evidence.

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 dispatcher from June 7, 2005 through June 2, 2006, when he was discharged for repeated performance problems. He had been employed with this employer on five prior occasions and was discharged previously for the same type of problems. The employer tried to help the claimant but reached the point where his conduct could no longer be tolerated.

The claimant had problems with attendance due to oversleeping and received a verbal warning on July 8, 2005. The employer later confirmed in an e-mail, the claimant's agreement to get whatever was necessary to wake him up in the mornings. The claimant did not have a driver's license and his supervisor gave him rides, but the claimant was often not ready when she arrived to take him to work. An unrelated written warning was issued to the claimant on December 2, 2005 for excessively using the employer's cell phone for personal calls and allowing his girlfriend to use the employer's cell phone. On May 19, 2006, the claimant was sent an e-mail regarding his failure to properly dispatch the drivers. The employer had several deliveries for Clorox, who has a zero tolerance for late loads, and the claimant scheduled two deliveries on May 18, 2006 which arrived late. When the employer spoke to him about it, the claimant offered multiple excuses, but was advised his dispatches needed to be done on time so the product could be delivered on time.

On another date in May 2006, near the previous incident, the claimant reported to work intoxicated. His supervisor noticed he was intoxicated when she arrived to take him to work and asked him whether he wanted to go to work in that condition. Since he did, the supervisor immediately talked with the president about the claimant's condition. The president spoke with the claimant and confirmed he was intoxicated. Before the president could take action, the CEO arrived at work, immediately noticed the claimant was intoxicated and drove him home. The next day, the claimant explained he was having problems with his girlfriend but that he was going to kick her out of his house. The claimant's supervisor and CEO issued a written warning, which all three signed in a meeting that following morning.

Approximately two weeks later, the claimant was not ready for work when his supervisor arrived. When she called him, he said he was not ready and would find his own ride to work. Through several phone calls, the claimant reported that his girlfriend hit him in the head with a "pipe," which was actually a shower curtain rod. The claimant was trying to get her out of the house and would not be reporting to work that day. He was subsequently discharged by the employer.

The claimant filed a claim for unemployment insurance benefits effective June 4, 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 § 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.

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 for failing to properly perform his job duties and for allowing his volatile personal life to have a detrimental effect on his employment. While he denies receiving certain warnings, he does effectively admit reporting to work drunk as a result of fighting with his girlfriend and failing to report to work as a result of fighting with his girlfriend. The claimant's conduct was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 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 June 22, 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 \$1,685.00.

sda/cs