

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AUGUST SIMON

Claimant

APPEAL NO: 12A-UI-03396-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JTV MANUFACTURING INC

Employer

OC: 02/26/12

Claimant: Respondent (2/R)

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

Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

JTV Manufacturing, Inc. (employer) appealed an unemployment insurance decision dated March 30, 2012, reference 01, which held that August Simon (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 April 18, 2012. The claimant participated in the hearing. The employer participated through Dennis Orthmann, production manager; David Johannsen, second shift supervisor; and Josh Bottjen, first shift supervisor. 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 misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a full-time laser operator from January 28, 2008 through January 23, 2012, when he was discharged for insubordination and a repeated failure to follow the employer's directives. He works second shift and was chronically late, for work for which the employer issued repeated verbal warnings and one written warning. The claimant denied receiving any warnings for absenteeism even though he signed the written warning issued on March 7, 2011, which also placed him on a four-day suspension. The employer is a fabrication shop that works with and cuts heavy pieces of steel. It operates on a two-shift system, so the second shift employees take over from the first shift employees, since the second shift must continue working on what the first shift has begun. While a particular employee from the first shift may not have to stay if the second shift employee is late, the employer has to assign someone to that position until the second shift employee arrives. Consequently, it becomes a serious issue when the second shift employee is late.

In the last two months alone, the claimant was late on the following dates and Second Shift Supervisor David Johanssen issued him regular warnings at least once or twice a week:

December 1, 2011	9 minutes late
December 2, 2011	13 minutes late
December 5, 2011	3 minutes late
December 6, 2011	7 minutes late
December 8, 2011	3 minutes late
December 9, 2011	7 minutes late
December 11, 2011	15 minutes late
December 12, 2011	4 minutes late
December 13, 2011	12 minutes late
December 15, 2011	11 minutes late
December 16, 2011	5 minutes late
December 18, 2011	4 minutes late
December 19, 2011	28 minutes late
December 20, 2011	7 minutes late
December 22, 2011	3 minutes late
December 23, 2011	5 minutes late
December 28, 2011	8 minutes late
December 29, 2011	9 minutes late
December 30, 2011	12 minutes late
January 4, 2012	1 minute late
January 10, 2012	11 minutes late
January 11, 2012	6 minutes late
January 12, 2012	2 minutes late
January 13, 2012	7 minutes late
January 16, 2012	27 minutes late
January 19, 2012	41 minutes late
January 20, 2012	9 minutes late
January 23, 2012	32 minutes late

Dennis Orthmann, the production manager, was present when the claimant arrived 32 minutes late on January 23, 2012 and he told the claimant he needed to make more of an effort to get to work on time. The claimant immediately had an attitude with Mr. Orthmann, arguing that he just worked the weekend and Mr. Orthmann needed to give him some slack. The claimant had completed his weekend shift at 6:00 a.m. that morning since the weekend shifts are 12 hours. He continued to argue and told Mr. Orthmann he was "out of line," so Mr. Orthmann told the claimant he could have a one week suspension.

However, as Mr. Orthmann was talking to the claimant, he noticed a heavy smell of alcohol on him. Mr. Orthmann was not closer than four feet to the claimant when he noticed this, so he asked Mr. Johanssen to find out if the claimant had been drinking. The claimant told Mr. Johanssen that he stopped drinking at 11:00 a.m. or 11:30 a.m. for his 4:00 p.m. shift. Mr. Orthmann then changed the claimant's suspension to a termination. During the hearing, the claimant admitted he told Mr. Orthmann that he stopped drinking around 11:00 a.m. or 11:30 a.m. but he now contends he only had two beers and stopped drinking around 9:00 a.m.

The claimant filed a claim for unemployment insurance benefits effective March 30, 2012 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 discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on January 23, 2012 for insubordination due to his repeated tardiness and his inappropriate behavior towards the production manager. The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa App. 1985). The claimant had no reason for his repeated tardiness, he simply did not choose to be on time every day even after being warned. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

Additionally, when the production manager simply advised him he needed to make more of an effort to be there on time, the claimant responded with inappropriate remarks. The fact that he

was drinking alcohol before working was simply another example of insubordination. It reflected his obvious disregard for the employer's interests and a disregard for his duties and obligations to the employer. 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 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 March 30, 2012, 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 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/kjw