

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TRISTAN A DAVIS

Claimant

APPEAL NO. 11A-UCX-00011-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ABM JANITORIAL SERVICES NORTH

Employer

OC: 02/01/09

Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated May 11, 2011, reference 04, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 20, 2011. Claimant participated. Employer participated by John Van Kaman, account manager. The employer was represented by Bunnie Marschke. The record consists of the testimony of John Van Kaman; the testimony of Tristan Davis; and Employer's Exhibits 1 through 8.

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 provides janitorial services. The claimant was assigned to work at the John Deere tractor cab assembly facility in Waterloo, Iowa. The claimant was hired on November 16, 2010, as a full-time cleaner. His last day of work was March 29, 2011. The claimant was suspended on March 30, 2011. He was terminated on April 4, 2011, for violation of the employer's time card policy.

When the claimant reported to work at the John Deere facility, his entrance into the facility was recorded through a scan of his badge. An entrance into the facility generated a report called "Access Denied, Granted and Other Badge Events." This report showed the date/time, the site of access, and the name of the cardholder. After the claimant entered the facility using his badge, he then proceeded to a time clock, where he would punch in. The punch in time was used for purposes of calculating the claimant's pay. The punch in time was always later than the access time.

In late March 2011, John Van Kaman, the account manager for the John Deere account, began reviewing the claimant's entry times and his time cards. His investigation showed that the claimant's punch in time was earlier than his entry time on March 3, 2011; March 7, 2011; March 8, 2011; March 11, 2011; and March 14, 2011. Mr. Van Kaman also found a discrepancy on or about March 28, 2011. Someone punched the claimant in at 4:33 p.m. and according to the access audit, the claimant did not access the building until 5:19 p.m. It was impossible for him to have punched in prior to accessing the building.

The employer has a written policy, Number 22, that prohibits false entries on a time card or allowing someone else to punch in for you. Violation of this work rule leads to termination. Payment of wages is based on the time cards and if an individual is punched in but not actually working, it is considered theft.

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.

Misconduct that disqualifies an individual from receiving unemployment benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed to an employer is honesty. An employer is entitled to establish written work rules concerning the reporting of time worked and can reasonably expect that employees will follow those rules. An employer can also reasonably

expect that an employee will not report hours worked in excess of those hours that actually were worked. The employer has the burden of proof to establish misconduct.

The greater weight of the credible evidence in this case established that the claimant falsified his time card on multiple occasions. Mr. Van Kaman testified that two records are created when an individual reports for work. The first record is the time an individual accesses the building. The second record is when the claimant punches in for work. The time clock is in the building and therefore the punch-in time cannot be prior to the building access time. Mr. Van Kaman discovered six instances in March 2011 where the claimant's time card was punched prior to the time he even accessed the building.

The claimant's explanation for these discrepancies is that the wrong access time was used. The claimant said he would leave the building to get something from his car and that his access time when he entered the building the second time must have been used. Mr. Van Kaman testified, however, that he used the first access time when the audit was done. The written reports confirm this testimony. The most reasonable inference from the evidence is that the claimant had an unknown individual punch him in at work before the claimant actually arrived at work. This constitutes a violation of the employer's policy and is theft of time. Misconduct has therefore been established. 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 May 11, 2011, reference 04, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw