

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THADDEUS WILKEY
Claimant

APPEAL NO. 10A-UI-00772-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SEMPER FI EXPRESS LLC
Employer

**Original Claim: 12/13/09
Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Semper Fi Express, LLC (employer) appealed an unemployment insurance decision dated January 7, 2010, reference 01, which held that Thaddeus Wilkey (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 February 23, 2010. The claimant participated in the hearing. The employer participated through Dimeric Burrell, Manager; Leslie Howard, Driver; and Nora Knapp, 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 employer discharged the claimant for work-related misconduct.

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 lead driver from February 16, 2009 through December 11, 2009. He had received two previous verbal warnings for insubordination and unsatisfactory work quality. The warnings were issued on April 13, 2009 and on July 6, 2009 and they addressed the claimant's bad attitude towards Manager Dimeric Burrell and upper management in general. The claimant gave false information to drivers and caused conflict in the workplace. He bragged about his salary to other employees, openly criticized Mr. Burrell, and said Mr. Burrell had an ego problem. He also complained about his hours and role in the company.

On December 11, 2009, driver Leslie Howard called the claimant and asked him to make a pick-up for her since she could not make it. As a lead driver, it was his responsibility to help out other drivers when needed. The claimant asked why Andre could not pick it up and he was told that Andre was helping another driver named Theresa because she was overloaded. The claimant subsequently called Theresa and told her that Ms. Howard said Mr. Burrell had to send

Andre out to help her because he says, "You're a fuck up." Theresa became very upset about this statement and called Andre, who subsequently reported it to Mr. Burrell. Mr. Burrell called Theresa and told her he never said anything like that and would never talk like that. Mr. Burrell then called Ms. Howard and asked her if she made a statement like that. She became upset and said she did not say anything like that. Ms. Howard was willing to openly confront the claimant about it. Mr. Burrell contacted the claimant and the claimant admitted saying that to Theresa. He was discharged at that time, since he had been previously warned about similar conduct.

The claimant filed a claim for unemployment insurance benefits effective December 13, 2009 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 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 on December 11, 2009 for

repeated insubordination. In the hearing, he admitted he told Theresa that, "Mr. Burrell said he sent Andre to Muscatine to fix Theresa's fuck up." The claimant was asked why he would repeat something like that if it was said, which the witness denied it, and the claimant responded, "I saw no harm in a little gossip." Apparently, there had been no change or improvement in the claimant's attitude from when he was previously warned. Any reasonable person, let alone a supervisor or lead driver, would know there is harm in creating or repeating negative gossip. The claimant's insubordination shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's 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 January 7, 2010, 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