

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY D LEHMKUHL
Claimant

APPEAL NO: 12A-UI-11669-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

BORDER STATES CONTRACT SVC INC
Employer

OC: 03/25/12
Claimant: Respondent (2-R)

Section 96.5-2-a - Discharge
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated September 20, 2012, reference 02, that held the claimant was not discharged for misconduct on July 5, 2012, and benefits are allowed. A telephone hearing was held on October 23, 2012. The claimant and employer did not participate. A decision was issued that affirmed the department decision.

The employer filed a motion for re-consideration as it did not receive a hearing notice and an Order was issued for a new hearing. A telephone hearing was held on November 28, 2012. The claimant did not participate. Rick Fischer, Owner, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUES:

Whether claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant began employment on July 29, 2009, and last worked for the employer as a full-time maintenance employee on July 5, 2012. The employer business is to clean rest areas.

On the evening of Saturday June 30, a co-worker at the Tiffin, Iowa rest area contacted the employer stating claimant was under arrest by Johnson County law enforcement and was taken into custody for assaulting a traveler. The worker reported claimant was in a bad mood and threw a cleaning sign at a traveler who was wearing a turban.

The employer discharged claimant on July 5 for assaulting the traveler pursuant to Iowa Code section 708.2(6) that is a misdemeanor. On October 23 claimant pled guilty to the assault and was given credit for time served (two days in jail).

The claimant failed to respond to the hearing notice. He has been receiving unemployment benefits on his claim.

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.

The administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on July 5, 2012.

Claimant was working at an employer business work site at the Tiffin rest area when he physically assaulted a traveler that constitutes a serious act of job disqualifying misconduct. His plea of guilty to the misdemeanor assault confirms his act of misconduct.

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.

Since claimant has been receiving benefits before the disqualification in this matter, the overpayment issue is remanded to Claims for an overpayment decision.

DECISION:

The department decision dated September 20, 2012, reference 02, is reversed. The ALJ decision issued October 24, 2012 is set aside. The claimant was discharged for misconduct on July 5, 2012. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css