

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BENJAMIN WELCH**  
Claimant

**APPEAL NO: 15A-UI-11909-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FEDERAL EXPRESS CORP**  
Employer

**OC: 01/11/15  
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct  
Section 96.3-7 – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 14, 2015, reference 04, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 10, 2015. The claimant participated in the hearing. Gabriel Rice, Operations Manager and Dave Peterson, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Four were admitted into evidence.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time courier swing driver for Federal Express from March 11, 2015 to September 29, 2015. He was discharged for accumulating three written warnings in a rolling 12-month calendar period in violation of the employer's policy.

On May 1, 2015, the claimant was backing out of a driveway and caught a guide wire to a power pole which lodged between the claimant's vehicle bumper and the quarter panel on the front passenger side of his truck. That incident resulted in damage in excess of \$1,000.00. Consequently, the employer issued the claimant a written warning letter May 8, 2015 (Employer's Exhibit Four). The warning addressed the preventable accident and stated, "Any three (3) notifications of deficiency (i.e., any combination of Warning Letters and/or Performance Reminders) received within a 12-month period may result in termination" (Employer's Exhibit Four).

On August 1, 2015, the claimant was pulling out of the employer's location and hit another of the employer's vehicles which was parked and unoccupied. Because the claimant struck a fixed object he received a performance reminder August 12, 2015 (Employer's Exhibit Three). That

warning contained the same language with regard to the claimant receiving three warning letters or performance reminders within a rolling 12-month period and it may result in termination of employment (Employer's Exhibit Three).

On September 22, 2015, the City of Windsor Heights informed the employer the claimant was caught speeding September 15, 2015, and was traveling 40 miles per hour in a 25-mile per hour zone in the 1400 block of 70th Street. When the employer received that information it immediately placed the claimant on a paid suspension while it conducted an investigation (Employer's Exhibit Two). After reviewing the final incident and the claimant's overall safety record during the six and one-half months he was employed with Federal Express, the employer notified the claimant his employment was terminated September 29, 2015, because he accumulated two written warning letters and a performance reminder, within a rolling 12-month period in violation of the employer's policy.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2,592.00 for the six weeks ending November 7, 2015.

The employer's representative, Leann Evans, submitted written documentation to the fact-finder in this case for the October 13, 2015, interview. She was waiting for the call from the fact-finder but when she did not receive the call she called the fact-finder and was told the Department was going to use her written statement instead of taking her verbal statement.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

The claimant had two preventable accidents and received a speeding ticket in just over a four-month period of time. Those incidents resulted in two written warning letters and a performance reminder. The employer's policy allows employees to accumulate any combination of three written warning letters or performance reminders within a rolling 12-month period before termination occurs. The claimant knew, or should have known, this policy and if he was not aware of it when he first started working for the employer he should certainly have been aware of it after he received the first written warning letter, which plainly states what disciplinary action would occur upon the receipt of three written warning letters or performance reminders or any combination thereof. While the first two incidents could be considered accidents, the claimant was on notice his job was in jeopardy following the May 8, 2015, warning letter and August 12, 2015, performance reminder. Instead of being even more careful to obey traffic rules and laws, as well as the employer's policy, however, the claimant choose to drive 15 miles over the speed limit in a residential area where he should have been aware, as a professional driver, that the speed limit was 25 miles per hour.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide

detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The unemployment insurance law 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. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. While there is no evidence the claimant received benefits due to fraud or willful misrepresentation, the employer participated in the fact-finding interview through the written statements of Leann Evans from Equifax. In addition to providing the written documentation, Ms. Evans was prepared and waiting to personally participate in the fact-finding interview but was not called by the fact-finder. When she called the fact-finder she was told the Department was going to rely on the employer's written documentation. Under these circumstances, the administrative law judge finds the employer participated in the fact-finding interview within the meaning of the law. Consequently, the claimant's overpayment of benefits cannot be waived and he is overpaid benefits in the amount of \$2,592.00.

**DECISION:**

The October 14, 2015, reference 04, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as 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 has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of \$2,592.00.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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