

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GLEN VESTAL**  
Claimant

**APPEAL NO. 08A-UI-05652-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ERLBACHER BROS INC**  
Employer

**OC: 05-18-08 R: 01  
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 9, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 2, 2008. The claimant did participate. The employer did participate through Dean Erlbacher, President and Owner of the Company.

**ISSUES:**

Was the claimant discharged for work-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a truck driver full time beginning March 31, 2003 through May 18, 2008 when he was discharged.

On May 16 the owner, Dean Erlbacher, talked to the claimant about a complaint he had about the claimant's behavior at a feed lot on May 12. The claimant's truck got stuck in the mud at the lot. The claimant began cursing and swearing at the truck as well as spinning the tires to the point where they smoked. The claimant admits that he lost his temper at the feed lot and that he was swearing and yelling at the truck. Other feed lot employees were around and witnessed the claimant's behavior. The claimant admits that when he gets mad or upset he vents his frustrations by being abusive to equipment and on occasion verbally abusive. The feed lot owner reported to the employer that the way the claimant was acting was foolish and that his behavior scared the other employees. The claimant was banned from the feed lot for his behavior. The employer's client B & H Brokerage fired the employer and will not allow the employer to haul any additional loads for them because of the way the claimant acted.

After the discussion on May 16 the claimant was told that he had to learn to control his temper and he must not swear or abuse the equipment. Mr. Erlbacher told the claimant that if he would

not stop abusing the equipment, control his temper and act more patiently than he would be fired. On May 18 the claimant returned to Mr. Erlbacher and told him that he could not be more patient, nor did he think he could control his temper or his abusive verbal outbursts. Mr. Erlbacher discharged the claimant.

The claimant had other instances where his impatience caused an accident and where he had lost his temper at customer job sites, causing him to be banned from another mill.

The claimant has received unemployment benefits since filing a claim with an effective date of May 18, 2008.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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.

After the incident of May 12 the claimant was told that he needed to control his temper by not verbally abusing customers, or physically abusing the employer's equipment. The claimant was told he needed to be more patient and considerate. The claimant told the employer he could not or would not do what the employer was requesting. An employer has a right to expect employees to perform tasks as requested. The employer's request that the claimant not be

verbally or physically abusive was within the employer's purview of determining how tasks should be performed. It is not unreasonable for an employer to expect employees not to abuse the equipment, no matter how bad of a day the employee is having. It is not unreasonable for an employer to expect an employee to speak in a non-abusive manner. The claimant would not even try to meet the employer's requests. The employer was not asking the claimant to guarantee that he would be perfect in the future, only that he would try to meet the employer's expectations. The claimant's indication to the employer that he would not try to meet the employer's reasonable requests constitutes disqualifying misconduct. Benefits are denied.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The June 9, 2008, reference 01, 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 is overpaid benefits in the amount of \$720.00.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/css