

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY L MADDEN
Claimant

APPEAL NO. 10A-UI-03407-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ASPLUNDH TREE EXPERT CO
Employer

OC: 01/24/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Asplundh, filed an appeal from a decision dated February 22, 2010, reference 02. The decision allowed benefits to the claimant, Larry Madden. After due notice was issued a hearing was held by telephone conference call on April 15, 2010. The claimant participated on his own behalf. The employer participated by General Foreman Jim Black.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Larry Madden was employed by Asplundh from January 4, 2010 until January 23, 2010 as a full-time tree trimmer. He received a copy of the employee handbook at the time of hire which explained the safety rules. In addition, every employee receives a weekly safety notice which is signed and filed. On January 19, 2010, the notice he received stated an employee will be subject to immediate discharge for any of the listed safety violations. One of the listed items was failure to wear a seat belt while in a company vehicle while it is in motion.

On January 23, 2010, General Foreman Jim Black was standing by the road as the trucks were leaving one job site for another. He noticed Mr. Madden was not wearing a seat belt and signaled the truck to pull over. It traveled some distance and then Mr. Black stepped on the running board and confirmed Mr. Madden was not wearing a seat belt. He told him to put it on which he did. Mr. Black conferred with his supervisor Adam Larson who confirmed the claimant should be discharged for the violation. Mr. Madden was notified a short time later by Mr. Black he was fired.

Larry Madden has received unemployment benefits since filing a claim with an effective date of January 24, 2010.

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 claimant had been advised only three days earlier he would be subject to discharge for violation of the listed safety rule, which included the failure to wear a seat belt in a company vehicle while it was in motion. He acknowledged he knew the rule but that the cab of the truck was a little crowded and he was having trouble putting on the seat belt. He did not provide an explanation as to why he simply asked the driver not to move the truck until he was belted in. He was discharged for violation of a known, zero-tolerance safety rule. In order to be disqualified from unemployment benefits for a single incidence of misconduct, the misconduct must be a deliberate violations or disregard of standards of behavior which the employer has the right to expect of employees. *Henry v. IDJS*, 391 N.W.2d 731 (Iowa App. 1986). The claimant's conduct was a willful disregard of the employer's safety rules and statutes of the state of Iowa. It is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of February 22, 2010, reference 02, is reversed. Larry Madden is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs