

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN MAYNARD**  
Claimant

**APPEAL NO. 08A-UI-06418-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMMESA INC**  
Employer

**OC: 06/08/08 R: 04**  
**Claimant: Respondent (2/R)**

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

**STATEMENT OF THE CASE:**

Ammesa, Inc. (employer), doing business as Professional Touch Cleaning Services, appealed an unemployment insurance decision dated July 7, 2008, reference 01, which held that Justin Maynard (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 July 29, 2008. The claimant did not participate in the hearing. The employer participated through Tammy Orr, Human Resources. Diane Ricketts-McCool, Mark Jett, Butch Overton, Jerry McMillan and Annie Bailey were present with the employer but did not participate. Employer's Exhibits One through Six were admitted into evidence. Based on the evidence, the arguments of the party, 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 considered all of the evidence in the record, finds that: The claimant was employed as a full-time commercial cleaner from April 25, 2008 through June 6, 2008 when he was discharged for poor work performance. He received sufficient training and could satisfactorily perform the duties assigned to him when he was done with training but subsequently failed to carry out those duties. His supervisor found incomplete work on seven different jobs from May 29, 2008 through June 6, 2008. There were numerous tasks on each job that had not been done and he was directed to return and complete these tasks. Sometimes the work was still not done even after his second visit to the worksite. He received six written warnings as a result of his substandard work, customer complaints and attendance.

The claimant received a written warning on May 5, 2008 for failure to return the key bag on May 2, 2008, which affected three clients. A warning was issued to him on May 13, 2008 for poor quality work at the ECS worksite. He had not swept or mopped the break room floor, the

repair room floor and the side entry. There were fingerprints in the front entry area, black scuff marks on the floor and the trash was not taken out. The claimant received a warning on May 14, 2008 for not calling in his time. Employees must call in their time to show when they start and stop working. The claimant received a warning for a no-call/no-show on June 3, 2008. Another warning was issued to him on June 4, 2008 for poor work quality. At ECS the paper towels were not re-stocked, the restroom wall by the sink was dirty, the chair bases were not wiped, none of the dusting was done and the microwave was not cleaned. Two of these issues were not completed when the account was re-inspected on June 5, 2008. At Yellowbook there were no paper towels in stock and the claimant failed to order any so the account was totally without paper towels. A second warning was issued to him on June 5, 2008 for again failing to call in his time. On June 6, 2008, an inspection at APG revealed the toilet bases were dirty, the microwave was not cleaned inside, the paper towels were not restocked and the main reception area light was left on. The claimant was discharged as he was repeatedly not performing the tasks as required. The employer could not continue to check his work every night and the claimant's performance did not improve even after he was warned.

The claimant filed a claim for unemployment insurance benefits effective June 8, 2008 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 for poor work performance. When an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. Iowa Department of Job Service, 386 N.W.2d 552 (Iowa App. 1986). The claimant had demonstrated he was capable of performing the work but simply elected not to do so even after repeated warnings. The claimant's substandard performance 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.

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. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code § 96.3-7-b is remanded.

**DECISION:**

The unemployment insurance decision dated July 7, 2008, 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 employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/css