

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD D WOODRUF
Claimant

APPEAL NO. 08O-UI-07350-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PER MAR SECURITY & RESEARCH CORP
PER MAR SECURITY SERVICES
Employer

OC: 09-16-07 R: 04
Claimant: Respondent (2R)

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 July 1, 2008, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 27, 2008. The claimant did participate. The employer did participate through Randy Mulder, General Manager; Jessica Savage, Second Shift Security Guard; (representative) Mathew Cunningham, Account Director; and Stephanie Wetterling, Second Shift Supervisor. Employer's Exhibit One was received. Claimant's Exhibit A was received.

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 second shift security guard full time beginning November 24, 2007 through June 11, 2008 when he was discharged.

The claimant was discharged after he got into an argument on June 9, with a truck driver entering the facility. The claimant was working at a guard house. A trucker pulled his truck into the lot but did not park in a location that the claimant thought was proper. The claimant approached the truck driver and called him a "stupid son of bitch" and told him not to "drive in the lot liked he owned the fucking place." The claimant then threatened to "kick the driver's ass" if he did not do as the claimant instructed.

The driver went to another guard house location and complained to the employee working there, Jessica Savage. Ms. Savage notified Stephanie Wetterling who came to the facility and eventually notified Matt Cunningham.

On June 10, Mr. Cunningham spoke to the claimant at the guard shack and the claimant denied doing anything inappropriately. At hearing the claimant denied that he had used profanity when speaking to the truck driver and that he had only raised his voice to be heard over the sound of the truck. The claimant denied making any threatening remarks to the driver.

About three weeks before this incident the claimant was disciplined by Mr. Cunningham for treating his supervisor, Stephanie Wetterling in an inappropriate manner. Ms. Wetterling was writing the claimant up for having unauthorized written material in the plant. The plant, the client of the employer, refuses to allow Per Mar employees to have books or written material in the plant when they are working security. The claimant became angry and began yelling, screaming and cussing at Ms. Wetterling for writing him up. Mr. Cunningham witnessed the claimant get within three inches of Ms. Wetterling's face while yelling at her. Mr. Cunningham had to step in between the claimant and Ms. Wetterling to get the claimant to stop yelling at Ms. Wetterling. Because the claimant had been previously disciplined for screaming and yelling at his supervisor as well as for swearing at her, he was discharged when the employer's investigation revealed he had yelled at and threatened a truck driver. The employer's handbook, a copy of which had been given to the claimant, prohibits use of abusive language.

The claimant has received unemployment benefits since filing a claim with an effective date of September 16, 2007.

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.

The claimant had previously been disciplined for using abusive language when speaking to his supervisor, including yelling at her. Three weeks later the claimant was yelling at a customer. The claimant's actions are conduct not in the employer's best interest. The administrative law judge is persuaded that the claimant did yell at the truck driver and threaten him while using abusive language. His actions constitute 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. 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 whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

DECISION:

The July 1, 2008, reference 03, 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 \$1,021.00.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css