

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BOB J MCMURRAY
Claimant

APPEAL NO. 14A-UI-02364-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUNNINGHAM INC
Employer

OC: 09/29/13
Claimant: Respondent (2R)

Section 96.5-2-a – Discharge for Misconduct
Section 96.307 – Overpayment of Benefits

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated February 28, 2014, reference 02, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on April 16, 2014, by telephone conference call. The claimant participated personally. Employer participated by Jacob Augustine, Human Resources Manager; Mike Caves, Division Project Manager; and Charles Cunningham, President. Employer's Exhibits 1-14 were received into evidence. Official notice is taken of agency records.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a mechanical contractor. The claimant was hired on December 9, 1997. He was a foreman for the roofing division. He was a full-time employee. His last day of work was November 18, 2013. He was terminated on November 19, 2013. The claimant was terminated because he failed to comply with the plan of action that he had entered into on October 30, 2013.

The incidents that led to the claimant's termination occurred on November 18, 2013. He arrived late at the job site. He was supposed to be there at 7:00 a.m. and did not arrive until 8:00 a.m. He left the work site without permission between 2:00 p.m. and 2:15 p.m. He was called repeatedly on a company issued cell phone and he did not answer until 3:46 p.m.

The claimant had agreed to a plan of action on October 30, 2013, which was designed to address what the employer viewed as serious issues concerning attendance and falsification of time records. The claimant had been leaving the job site early without permission and not accurately showing this on his time record. The claimant agreed that he would not leave unless he had permission to leave. The claimant knew that his job was in jeopardy.

The claimant established his claim for unemployment insurance benefits on September 29, 2013, after he was laid off. He did not accurately report his income to the agency according to the employer and did not advise the agency that he had returned to work. There is a fraud investigation ongoing. There was no fact finding done by the agency on the separation issue.

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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. One of the most fundamental duties owed to the employer is honesty and an employer can reasonably expect that an employee will be at work as scheduled and accurately fill out time cards. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The claimant's actions on November 18, 2013, show a blatant disregard for the employer's interests by arriving late to the job site; leaving early without permission; and not answering calls made to him on a company-issued cellphone. The claimant had entered into a plan of action where he specifically agreed that he would not leave the job site without permission and he failed to follow that agreement. The claimant knew that his job was in jeopardy. The claimant failed to offer a credible explanation on why he left early and did not answer the phone. The claimant's actions are misconduct. Benefits are denied.

The claimant has been overpaid unemployment insurance benefits. The parties notified the administrative law judge that there is currently a fraud investigation ongoing concerning claimant's receipt of benefits after a layoff, which just precedes the separation of employment in this case. In view of that ongoing investigation, the issues on the amount of the overpayment; whether the claimant is required to repay the overpayment; and whether the employer's account should be charged are remanded to the department.

DECISION:

The decision of the representative dated February 28, 2014, reference 02, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefits amount, provided claimant is otherwise eligible. The overpayment issues are remanded to the department for consideration.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css