

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARNOLD L THOMPSON
Claimant

APPEAL NO. 08A-UI-07059-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**AMERICAN BUILDING MAINTENANCE CO
OF KENTUCKY INC**
Employer

**OC: 06/29/08 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated July 25, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on August 19, 2008. The claimant, although duly notified, failed to respond to the hearing notice and did not participate. The employer participated by Bill Stasek, hearing representative, and witness Karen McDowell, district manager.

ISSUE:

The issues in this matter are whether the claimant was discharged for misconduct in connection with his work and whether the claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from July 27, 2004, until July 3, 2008, when he was discharged by the employer. Mr. Thompson worked as a janitorial worker on a full-time basis and was paid by the hour. His immediate supervisor was Misty Martin.

Mr. Thompson was discharged when it was determined that he had provided false information on time slips for the night of June 26, 2008, and the employer reasonably concluded that the claimant had locked himself in an inaccessible area to sleep on the job. During that evening, the employer had attempted on numerous occasions to locate Mr. Thompson at his designated work areas. Attempts to locate the claimant by security, the company, as well as security cameras, did not show Mr. Thompson to be present or performing his work as he had indicated on time cards. The employer concluded that the claimant's statement that he had become ill and slept for a period of time were untruthful. Based upon the claimant's violation of numerous company policies, he was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Thompson was discharged for misconduct in connection with the employment. It does.

In this case, the employer's witness participated personally and provided sworn testimony, testifying that repeated searches of the claimant's work area did not disclose Mr. Thompson to be present and performing duties as he had indicated on his time card. Security tapes of the area did not show the claimant working, and individuals who were specifically assigned to search for Mr. Thompson were not able to find him in accessible areas in the work area where he was assigned to be performing his duties. Swipes by the claimant's access card show that the claimant did not correctly report his working hours for the night in question, in addition to the claimant's failure to perform his duties. Although given the opportunity to participate personally and provide sworn testimony in this matter, Mr. Thompson declined to do so.

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.

For the reasons stated herein, the administrative law judge concludes that the claimant was discharged for misconduct. Unemployment insurance benefits are withheld.

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.

DECISION:

The representative's decision dated July 25, 2008, reference 01, is hereby reversed. The claimant was discharged for misconduct in connection with the claimant's employment. Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge remands the matter to the Claims Division for a determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay that amount.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw