

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUBEN HERNANDEZ
Claimant

APPEAL NO: 09A-UI-10007-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 05/31/09
Claimant: Respondent (2/R)

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

STATEMENT OF THE CASE:

Swift & Company (employer) appealed an unemployment insurance decision dated July 2, 2009, reference 01, which held that Ruben Hernandez (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, 2009. The claimant participated in the hearing. Ike Rocha interpreted on behalf of the claimant. The employer participated through Tony Luse, Employment Manager. Based on the evidence, the arguments of the parties, 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 production worker from January 22, 2007 through May 28, 2009 when he was discharged. He had previously worked for the employer in 1992, 1995 and 1999. The claimant sustained no work-related injuries while working for the employer. He was rehired on January 17, 2007 and part of the application process was that he had to undergo a routine physical and drug screen. The documentation provided for the physical and drug screen were both in English and Spanish. The claimant chose the English document and completed it. He added his wife's name as an emergency contact which demonstrates he understood the document since he testified no one was with him at the time he applied for work. The claimant spoke English to Tony Luse, the Employment Manager. The claimant failed to disclose that he had underwent back surgery in 2004 and signed the document in two places on January 17, 2007. He was made aware that falsification on the employment application or the accompanying medical paperwork would be grounds for termination.

The claimant went to the employer's health services department on approximately May 27, 2009. He complained of back pain and reported he had back surgery in 2004. The claimant was subsequently discharged for failure to disclose his serious medical condition at the time of hire. His failure to do so could have resulted in endangering his health or safety. Had the employer known about the claimant's previous back surgery, the employer would have had the claimant seen by a company physician for a complete medical evaluation before proceeding further.

The claimant filed a claim for unemployment insurance benefits effective July 2, 2009 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 failing to disclose a

previous back surgery at his physical, which was completed in tandem with his employment application. When a person willfully and deliberately makes a false statement on an employment application, such falsification shall be an act of misconduct in connection with the employer. The statement need not be written and an omission of a pertinent fact would have the same effect. The falsification must be such that it does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy. 871 IAC 24.32(6).

The Iowa Supreme Court has stated that a misrepresentation on a job application must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570, 571 (Iowa 1991). While this statement is *dicta* since the court ultimately decided Larson was discharged for incompetence not her deceit on her application, the reasoning is persuasive. The court does not define materiality but cites Independent School Dist. v. Hansen, 412 N.W.2d 320, 323 (Minn. App. 1987), which states a misrepresentation is not material if a truthful answer would not have prevented the person from being hired.

In the case herein, the misrepresentation is material because the employer would not have hired the claimant without an additional medical evaluation. However, the employer was not given this opportunity and hired the claimant based on his blatant omission of facts. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated July 2, 2009, 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 matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css