

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTOPHER B MALONE
Claimant

APPEAL NO. 07A-UI-10065-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CRACKER BARREL
OLD COUNTRY STORE INC**
Employer

**OC: 09/09/07 R: 01
Claimant: Respondent (2)**

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 October 24, 2007, reference 02, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on November 15, 2007. Claimant did not participate. Employer participated through Scott Miller. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits and if so, whether he is overpaid benefits as a result.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time night maintenance worker from July 31, 2006 until March 16, 2007, when he was discharged. His work performance went downhill with each review, even after retraining and additional help for a job usually performed by one person. Employer suspected personal problems and referred him to employee assistance for help but he did not follow through. He scored 91% on his performance evaluation after the first month. A passing score to retain employment is 80% on the first evaluation and 85% on subsequent evaluations. A score of 90% is required for a raise. The second evaluation three months later was scored at 87% and employer gave claimant notes to improve on mopping under tables and chairs, dusting high places, detailing, and maintaining chemical closets. On February 14, 2007, employer scored the third evaluation at 77% because earrings are not allowed and employer repeatedly had to ask him to remove them, he failed to maintain the kitchen floors, took excessive breaks, and did not work with speed and accuracy since the job was normally to be complete by 6 a.m. and he was there regularly finishing work up to an hour later when customers were present. The final evaluation on March 16, 2007 scored 58% after his performance went downhill markedly for not filling toilet paper dispensers, leaving floors dirty, and having to redo work every day. He did not clean doors, polish brass, clean the parking lot, and used the same mop head so it moved dirty water around and left dirt marks on the floor.

The claimant has received unemployment benefits since filing a claim with an effective date of September 9, 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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

Claimant's repeated failure to adequately and fully perform his job duties after having established the ability to do so (drop in performance scores from 91% to 58%) is evidence of his willful intent not to do so and is 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. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The October 24, 2007, reference 02, 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 \$404.00.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/kjw