

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**TODD E BARNETT
7610 SW 11TH ST
DES MOINES IA 50315**

**PROPERTY IMPROVEMENT
318 FLEETWOOD DR
DES MOINES IA 50315**

**Appeal Number: 04A-UI-00421-RT
OC: 12/07/03 R: 02
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

The employer, Property Improvement, filed a timely appeal from an unemployment insurance decision dated January 5, 2004, reference 02, allowing unemployment insurance benefits to the claimant, Todd E. Barnett. After due notice was issued, a telephone hearing was held on February 23, 2004, with the claimant participating. The employer did not participate in the hearing because the employer's witness, James Taylor was not at the telephone number, which had been called in prior to the hearing. The administrative law judge tried three times to call a telephone number previously provided by the employer, but on each occasion reached the voice mail of a "James." The administrative law judge two times left a message indicating that he was going to proceed with the hearing and if the employer wanted to participate in the

hearing, someone for the employer, including Mr. Taylor, needed to call the administrative law judge before the hearing was over and the record was closed. The hearing began when the record was opened at 9:05 a.m. and ended when the record was closed at 9:15 a.m. and no one from the employer had called during that time. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time laborer from September 2003 until he was discharged on December 8, 2003. At the time of his discharge he was informed by James Taylor, owner, that he was simply not working out and was discharged. Mr. Taylor offered no specific reasons to the claimant. On the day before, the claimant had cut a piece of sheetrock at the dimensions requested by Mr. Taylor. The claimant twice asked Mr. Taylor about the dimensions and then cut the sheetrock to those dimensions. However, apparently the size was incorrect and Mr. Taylor claimed that the claimant had cut it wrong, but the claimant had cut it at the dimensions requested. The claimant asked if he should come to work the next day and Mr. Taylor said no he should call. When the claimant called, he was told that he was discharged. The claimant had a couple of oral warnings for leaving his truck messy, but he was told to use the truck, and therefore, it got dirty. The claimant did not drop a cigarette on an office floor and burn the office floor, and he did not urinate on the floor in a bathroom.

Pursuant to his claim for unemployment insurance benefits filed effective December 7, 2003, the claimant has received unemployment insurance benefits in the amount of \$4,048.00 as follows: \$368.00 per week for 11 weeks from benefit week ending December 13, 2003 to benefit week ending February 21, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant was overpaid unemployment insurance benefits. He is not.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Specifically, the employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant credibly testified that he was discharged after cutting a piece of sheetrock to the dimensions requested, but then the sheetrock was not the right size and was blamed for cutting it wrong. However, the claimant had cut the sheetrock to the appropriate requested dimensions. The claimant adamantly

denied dropping a cigarette on an office floor and burning the office floor and further adamantly denied urinating on the floor in a bathroom. The claimant had received a couple of warnings for a messy truck, but this was because he needed to use the truck. The administrative law judge does not believe that a messy truck establishes disqualifying misconduct. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

Iowa Code Section 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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$4,048.00 since separating from the employer herein on or about December 8, 2003 and filing for such benefits effective December 7, 2003. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of January 5, 2004, reference 02, is affirmed. The claimant, Todd E. Barnett, is entitled to receive unemployment insurance benefits provided he is otherwise eligible. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

kjf/b