

**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**

**CHARLES R SARGENT
405 N 8TH ST
INDIANOLA IA 50125**

**INDIANOLA COMMUNITY SCHOOL
DISTRICT
ATTN SECRETARY
1304 E 2ND AVE
INDIANOLA IA 50125**

**Appeal Number: 05A-UI-07298-RT
OC: 10-10-04 R: 02
Claimant: Respondent (2)**

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, Indianola Community School District, filed a timely appeal from an unemployment insurance decision dated July 7, 2005, reference 06, allowing unemployment insurance benefits to the claimant, Charles R. Sargent. After due notice was issued, a telephone hearing was held on August 3, 2005, with the claimant participating. Darcy Moeller, Business Manager, participated in the hearing for the employer. Jim Garrett, Building and Grounds Director, was available to testify for the employer but not called, because his testimony would have been repetitive and unnecessary. Employer's Exhibits One and Two were admitted into evidence. 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, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time substitute custodial employee from June 8, 2005, until he was discharged on June 14, 2005. The claimant was to be hired full-time as a custodial employee by the school board once a background check had been successfully completed. The claimant was discharged for falsifying his employment application. On April 7, 2005, the claimant completed an employment application as shown at Employer's Exhibit One answering "no" to the question whether the claimant had ever been convicted of a felony or any offenses involving moral turpitude. The employment application indicates that a misrepresentation or willful omission may be sufficient cause for disqualification of the application or termination of employment. On that same day, the claimant signed permission for an Iowa criminal history record check with the Division of Criminal Investigation, as shown at Employer's Exhibit Two. The employer received some notice on June 7, 2005, that there were some convictions on the claimant's record. The employer received the details on June 13, 2005. In 1980, the claimant was convicted of burglary in the second degree with intent to do bodily harm, a felony. In 1976, the claimant had two convictions for misdemeanor assault and in 1978, a third conviction for misdemeanor assault. All three assault convictions were for different assaults.

The employer is a school district and had placed the claimant at an elementary school. The falsification on the work application could result in exposing the employer to legal liabilities or penalties or placing the employer in jeopardy because of its unusual position of educating minors and the claimant's placement in an elementary school. If the claimant had answered truthfully to the question on the employment application concerning convictions, the claimant would not have been hired or, at the very least, the employer would have obtained sufficient details to have determined further whether it would be appropriate to hire the claimant. There was no other reason for the claimant's discharge. Pursuant to his claim for unemployment insurance benefits filed effective October 10, 2004, and reopened effective June 12, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,034.00 since separating from the employer on or about June 14, 2005, and reopening his claim for benefits effective June 12, 2005 as follows: \$299.00 for benefit week ending June 18, 2005 (earnings \$88.00); \$310.00 per week for two weeks, benefit weeks ending June 25, 2005 and July 2, 2005; and \$115.00 for benefit week ending July 9, 2005 (earnings \$288.00).

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.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification 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, such falsification shall be an act of misconduct in connection with the employer.

The parties agree that the claimant was discharged but disagree as to the date. The administrative law judge concludes that the claimant was discharged on June 14, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Although it is a close question, the administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only reason given by the employer's witness, Darcy Moeller, Business Manager, for the claimant's discharge was the falsification of his employment application at Employer's Exhibit One. The claimant answered "no" to the question whether he had ever been convicted of a felony or any offenses involving moral turpitude. Moral turpitude is thereafter defined. The claimant marked "no." However, a background check, authorized by the claimant, divulged a felony conviction and three misdemeanor assault convictions. It is clear that the claimant's employment application was false.

The real issue here is whether the claimant willfully and deliberately made a false statement in his employment application. The administrative law judge is constrained to conclude here that the claimant did so. The claimant testified that the convictions occurred over 24 years ago, which is true, and that he was excited about his job, which is also no doubt true. However, the claimant testified that he did not think about his convictions when he filled out the application and did not omit them on purpose. Although this is a close question, the administrative law judge must conclude that this testimony is not credible. The claimant had a felony conviction for burglary in the second degree with intent to do bodily harm in 1980. It is not credible to the administrative law judge that the claimant could forget about this conviction even though it occurred over 24 years ago. This was a serious matter and the claimant was, after all, applying for a position as a custodial employee for a school district and was ultimately assigned to an elementary school. The claimant also had three misdemeanor assault convictions. To forget about all of these convictions is simply not credible to the administrative law judge. The administrative law judge is not without sympathy for the claimant, who was terminated from a job because of something that happened over 24 years ago. However, the claimant cannot forget about or omit such serious offenses in his efforts to obtain a job, especially when he knew that the employer was going to do a background criminal check. As shown at Employer's Exhibit Two, the claimant, on the same day he did his employment application, signed a waiver for a criminal background check. This, at the least, should have triggered a memory in the claimant so as to cause him to correct any statement in his employment application. The claimant did not do so and, therefore, the administrative law judge must conclude that his false statement was willful and deliberate.

The administrative law judge further concludes that the claimant's willful and deliberate false statement could result in endangering the health, safety, morals of others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy. The administrative law judge makes no accusations against the claimant, but if anything untoward should have happened while the claimant was employed, the employer here, a school district, would no doubt be subjected to significant legal liabilities or penalties.

The misrepresentation or falsification 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 (Iowa 1991). Although the court did not define materiality, it cited Independent School District v. Hansen, 412 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Here, Ms. Moeller credibly testified that the claimant would not have been hired had he answered truthfully and the administrative law judge concludes, therefore, that the misrepresentation was material. Ms. Moeller testified at one point that, at the very least, the employer would have sought sufficient details from the claimant so as to make an appropriate decision as to his hiring. The employer would have changed its approach significantly had the claimant answered truthfully and the administrative law judge concludes that this also establishes materiality.

Accordingly, the administrative law judge concludes that the claimant willfully and deliberately made a false statement on his application for work form which could result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy and which misrepresentation or false statement was material and, as a consequence, this falsification was disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 \$1,034.00 since separating from the employer herein on or about June 14, 2005, and reopening his claim for benefits effective June 12, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of July 7, 2005, reference 06, is reversed. The claimant, Charles R. Sargent, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,034.00.

pjs/kjw