

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LARRY L ABBAS

Claimant

ZIP'S TRUCK EQUIPMENT INC

Employer

APPEAL NO. 12A-UI-08219-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/10/12

Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct

Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated June 29, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on September 17, 2012. The claimant participated personally. The claimant was represented by Kit O'Donohoe, Attorney at Law. Derek O'Neill was a witness for the claimant by subpoena. The employer participated by Paul Rottinghaus, Owner. Jim Reems and Luke Chatfield were witnesses for the employer. The record consists of the testimony of Paul Rottinghaus; the testimony of Jim Reems; the testimony of Luke Chatfield; the testimony of Larry Abbas; the testimony of Derek O'Neill; and Claimant's Exhibit A.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer builds and sells automotive towing equipment and is a used truck dealer. The claimant was hired on December 5, 2006, as a full-time mechanic. The claimant's last day of work was February 17, 2012. He was terminated on February 17, 2012.

The incident that led to the claimant's termination occurred on February 16, 2012. Several of the employees were listening to the state high school wrestling tournament on the radio. The claimant did not share their enthusiasm for the sport and made a vulgar comment about the sport. He then turned his radio higher, which was tuned to some music. This led to a verbal altercation between the claimant and another employee named Jim Reems. Radios were turned on and off and speaker wires were cut.

Mr. Reems returned to his stall and the claimant followed him. The claimant took out a box cutter type knife from his pocket and exposed the blade. He threatened to cut the claimant and then he put the knife behind his back. He also made a comment about finishing what he had done. Mr. Reems was fearful that the claimant would come to his home in Charles City. He sent his grandchildren to another home and reported the matter to the Charles City police.

Paul Rottinghaus, the owner, was not present but learned about the incident the next day. He interviewed all of the employees, including the claimant. The employer has a zero tolerance for violence in the workplace. This is contained in the employer's employee handbook. The claimant was terminated as a result of this incident.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. Every employer has the obligation to provide a workplace that is safe for all workers and free of harassment, threats, and violence. The employer has the burden of proof to show misconduct.

In this case, the greater weight of the evidence established that the claimant was discharged for harassment and a threat of violence. The findings of fact show how the credibility issues were resolved by carefully considering all of the evidence and the burden of proof. The claimant himself testified that he took out the box cutter type knife in order to hit Mr. Reems. There is no credible evidence that the claimant took these actions because he himself was in danger or that Mr. Reems, in effect, threw the first punch. Rather the claimant followed Mr. Reems into Mr. Reems' work area and pulled out a knife. This is a breach of his duty of decency and civility as well as a breach of the employer's material interest in providing a safe workplace. Misconduct is established. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated June 29, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css