

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ABRAHAM FLORES
Claimant

APPEAL NO. 14A-UI-01272-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIRSTCO INC
Employer

OC: 12/08/13
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Firstco, Inc. (employer) appealed an unemployment insurance decision dated January 27, 2014, reference 01, which held that Abraham Flores (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 February 26, 2014. The claimant participated in the hearing. The employer participated through Human Resources Manager William Kozlowski, General Manager Trevor Thompson, First Shift Supervisor Tom Oliver, Second Shift Maintenance Employee Shaun Powell, and Walcott Police Chief Jeff Blake.

ISSUES:

The issues are whether the claimant is disqualified for benefits, whether he was overpaid unemployment insurance benefits, whether he is responsible for repaying the overpayment and whether the employer's account is subject to charge.

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 tire mounter from August 20, 2012, through December 2, 2013, when he was discharged for suspected theft of company property. The week before Thanksgiving, co-employee Shaun Powell, overheard the claimant say he wanted these particular, heavy duty tires the employer had in stock. These tires cost approximately \$300.00 each and are DOT rated tires which are used for specific applications. As an example, they can be used on the back of a semi-truck or concrete truck or on the front of a John Deere backhoe. Mr. Powell reported what he heard to management, who had been performing random audits.

After the Thanksgiving holiday and on December 2, 2013, the employer noticed two of these tires missing although they had been there in the audit during the previous week. Mr. Powell informed the employer he had been at the claimant's residence on the Saturday after Thanksgiving and saw two of these tires in the claimant's garage. The employer questioned the claimant about it and discharged him as a result. The Walcott Police were called that same day

to investigate the theft. Walcott Police Chief Jeff Blake testified in the hearing that the claimant has subsequently been arrested for theft of these tires. He was charged with theft in the third degree, an aggravated misdemeanor.

The claimant filed a claim for unemployment insurance benefits effective December 8, 2013, and has received benefits after the separation from employment in the amount of \$3,110.00. Human Resources Manager William Kozlowski participated in the fact-finding interview on behalf of the employer.

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. 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. 871 IAC 24.32(1).

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The employer discharged the claimant on December 2, 2013, for suspected theft of the employer's property. When a claimant intentionally disregards the standards of behavior that the employer has a right to expect of its employees, his actions are misconduct. Although his subsequent arrest for theft happened after the termination, it supports the employer's evidence. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

The issue of gross misconduct was not listed on the hearing notice and is therefore not decided. Gross misconduct provides an enhanced disqualification based on a conviction of an indictable offense or a written statement admitting to the commission of an indictable offense. An employer has five years to protest a claimant based on a discharge for gross misconduct. Iowa Code § 96.5-2-b. The claimant is already disqualified for misconduct, but if the employer wishes to raise the gross misconduct issue, it must file a protest with the Agency on that basis and supply the necessary information to show grounds for a gross misconduct disqualification.

Because the claimant has been deemed ineligible for benefits, any benefits he has received could constitute an overpayment. The unemployment insurance law requires benefits be recovered from a claimant who receives benefits from an initial decision and is later denied benefits from an appeal decision, even though the claimant acted in good faith and was not otherwise at fault. In some cases, the claimant might not have to repay the overpayment if both of the following conditions are met: 1) there was no fraud or willful misrepresentation by the claimant; and 2) the employer failed to participate in the fact-finding interview. If the overpayment is waived due to the employer's failure to participate, that employer's account continues to be subject to charge for the overpaid amount. See Iowa Code § 96.3-7.

In the case herein, a waiver cannot be considered because the employer participated in the fact-finding interview. See 871 IAC 24.10. Its account is not subject to charge and the claimant is responsible for repaying the overpayment amount of \$3,110.00.

DECISION:

The unemployment insurance decision dated January 27, 2014, 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 claimant is overpaid benefits in the amount of \$3,110.00.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs