

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY BURLAGE
Claimant

APPEAL NO: 10A-UI-17824-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOMEXTERIOR BUILDING SUPPLY INC
Employer

**OC: 11-28-10
Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 22, 2010, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 11, 2011. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Dan Osweiler, Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time salesman for Homexterior Building Supply from May 17, 2010 to November 15, 2010. As a new salesman the employer required that the claimant live in Webster City, Iowa, so it could provide the required training with Owner John Bernard. As time went by the claimant asked several times if he could live in and work out of Osage, Iowa, approximately 100 miles from Webster City. Mr. Bernard denied his repeated requests to move to Osage, where the claimant's girlfriend lived, because he wanted the claimant to work in Webster City to continue training and be in a central location. Mr. Bernard allowed another employee to live outside Webster City previously and that experiment did not go well and he felt the claimant needed to be in Webster City and be supervised. Mr. Bernard had GPS in all company vehicles and noticed around the week of November 8, 2010, the claimant's company vehicle was parked at the same Osage address for five straight nights. On November 11, 2010, Mr. Bernard observed that the claimant went to Osage, drove back to Webster City and then returned to Osage which led Mr. Bernard to believe he was using his company provided van to move to Osage and doing so behind his back. At that time Mr. Bernard directed Manager Dan Osweiler to terminate the claimant's employment. When notified of the discharge the claimant did not deny the allegations against him.

The claimant has claimed and received unemployment insurance benefits since his separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant asked to move to Osage several times and Mr. Bernard denied his request each time. Mr. Bernard's denial was not arbitrary or capricious but based on the fact the claimant was new to sales and required supervision and guidance from Mr. Bernard. He also wanted him based in a more central location. The employer's GPS showed the claimant disregarding Mr. Bernard's decision and driving the company van to Osage, where his girlfriend lived, five straight nights from November 8 through 12, 2010. Additionally, the claimant drove the company van from Webster City to Osage then back to Webster City before returning to Osage November 11, 2010, which led to the reasonable conclusion that the claimant was using the employer's van to move to Osage. Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's

interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code Section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code Section 96.3-7-b is remanded to the Agency.

DECISION:

The December 22, 2010, reference 01, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code Section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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