

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SURUOSH R ALEHY**  
Claimant

**APPEAL NO. 17A-UI-01409-TNT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**EYM GROUP INC**  
Employer

**OC: 01/08/17**  
**Claimant: Respondent (2)**

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

**STATEMENT OF THE CASE:**

EYM Group, Inc., the employer, filed a timely appeal from a representative's decision dated January 27, 2017, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 1, 2017. Claimant participated. Participating as a witness for the claimant was Ms. Jodyic Dennett, Assistant Marketing Manager. The employer participated by Mr. Salvador Elias, Director, and Ms. Jennifer Oxenreider, Marketing Manager. Employer's Exhibits A through L were admitted into the hearing record. Claimant's Exhibits A through F were offered, but not received into the hearing record based on the employer's objection that they had not received copies.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct in connection with his work.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Suruosh Alehy was employed by EYM Group, Inc. DBA Burger King from July 7, 2014 until December 19, 2016, when he was discharged from employment. Mr. Alehy had initially been hired as a district manager, but later had been promoted to full-time marketing manager for the state of Iowa. Mr. Alehy was paid by salary and his immediate supervisor was Ms. Alandra Fonseca.

Mr. Alehy was discharged from his employment with EYM Group, Inc. on December 19, 2016, when the employer became aware that the claimant and other partners had opened a restaurant business in Newton, Iowa. The opening of the Burrito Torpedo was reported in the Newton Daily News on that date. The newspaper report stated that Mr. Alehy had created a number of new jobs in the community that included 12 employees, two shift managers, and a general manager. The report focused on Mr. Alehy who was at the facility that day, working and greeting customers.

Mr. Alehy was employed full-time by the EYM Group, Inc. The employer operates a chain of restaurants DBA Burger King. The employer considered the claimant's involvement in the ownership and/or operation of his restaurant with his partners to be a conflict of interest on the part of Mr. Alehy and a violation of his fiduciary responsibility, as the statewide marketing manager for his employer. Mr. Alehy had not informed his employer that he was opening his own restaurant. The employer reasonably believed that the claimant used his knowledge of the company's business, its policies, its methods, business plans and other proprietary business information in establishing his own business with his partners. Mr. Alehy's restaurant was considered a competitor by his employer.

On December 19, 2016, when informed that the claimant and his partners had opened a restaurant, the employer then concluded that the claimant had been using EYM Group, Inc.'s business sources to procure restaurant items in preparation for opening his own establishment, and the claimant was also diverting the employer's property for use in his establishment. The employer had been aware of stocking inconsistencies had recently been taking place, but prior to December 19, 2016, the employer did not realize that the stock inconsistencies and the way that the claimant performed his work were intentional and for the purpose of opening his own restaurant in competition with his employer.

Store managers and employees had reported that the claimant had at times removed things such as janitorial supplies, chemicals, serving items, and that the claimant had ordered food stuffs that were not normally used in the operation of its Burger King locations. On other occasions, items that had been ordered for Burger King locations were missing and some orders placed by the claimant for food stuffs were of the type normally associated with the Mexican cuisine of the claimant's new restaurant. They were not related to any food items offered by the employer (see Employer's Exhibit E).

It is the claimant's position that he, along with his wife and brother-in-law, opened the restaurant in Newton, Iowa. Mr. Alehy maintains that his business activity was solely as an "investor". The claimant maintains that he had decided to invest in the Mexican cuisine restaurant because his request to buy stocks from EYM Group, Inc. had been denied by the company. Mr. Alehy maintains that numerous items related to the opening and operation of a restaurant were purchased independently by himself and his partners to open the new business. The claimant asserts that because of the nature of his work, he often redistributed the company food and preparation items to various Burger King locations.

Mr. Alehy further maintains that because his letter of discharge states only that the company had lost trust in his execution and his full-time devotion to his responsibility as a marketing manager for the company, no misconduct was established by the employer at the time of his job separation. The claimant maintains that the employer only asserted that the claimant had been discharged for misconduct after Mr. Alehy had filed a claim for unemployment insurance benefits.

#### **REASONING AND CONCLUSIONS OF LAW:**

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The focus is on

deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order to establish misconduct to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. See 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979). The conduct must show a 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 the employee's duties and obligations to the employer.

In the case at hand, the evidence in the record establishes that the claimant knowingly took the necessary steps to establish a food service business without informing his employer in advance that he and his partners would be operating a food service business that might be considered to be a competitor by Mr. Alehy's long-term employer, the EYM Group Inc. Mr. Alehy was employed as the EYM Group's marketing manager for the entire state of Iowa, and as such, had knowledge of company suppliers, procedures, business tactics, and other important proprietary information and was not free to disclose it to others or use it for his own personal use, unless his employer had knowledge of the claimant's activities and did not object. From time to time, the employer noted that various restaurant items could not be accounted for, but there had been a nexus or connection to the items and Mr. Alehy's work for the company. Along with food preparation items that could not be located, orders had been placed using company sources for Mexican cuisine, a menu item not usually featured with Burger King locations.

When the employer became aware through public media that Mr. Alehy and his partners had opened their own restaurant to the public, the employer noted a pattern between the missing items, the unusual food stuff orders, and Mr. Alehy's opening the Mexican cuisine restaurant.

Based upon the evidence in the record, the administrative law judge concludes the employer was reasonable in concluding that the claimant had been engaging in conduct that was contrary to their interests leading up to the opening of the Burrito Torpedo restaurant and that the claimant had violated a fiduciary responsibility to the company by using the company's proprietary information to establish a business in competition with EYM Group Inc.'s restaurants. The employer was also reasonable in concluding that Mr. Alehy's business activities in conjunction with the opening of the new restaurant were beyond that of solely an investor. The employer concluded that the claimant was an active participant in establishing, providing information in starting the restaurant, and was an active participant in the new restaurant's operation.

The administrative law judge concludes the claimant's conduct was a material breach of his duties and obligations owed to his employer and the disregard of his employer's standards of behavior which the employer had a right to expect of its employees under the provisions of the Iowa Employment Security Law. Accordingly, the claimant is disqualified from unemployment insurance benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment benefits in the amount of \$4,932.00 since filing a claim with an effective date of January 8, 2017, for the benefit weeks ending January 14, 2017 through March

11, 2017. The administrative record also establishes that the employer did not participate in the fact-finding interview or make a first-hand witness available for rebuttal.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the claimant did not receive benefits due to fraud or willful misrepresentation and employer failed to participate in the finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

**DECISION:**

The representative's decision dated January 27, 2017, reference 01, is reversed. The claimant was discharged for misconduct in connection with his work. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$4,932.00. The claimant is not obligated to repay the agency the overpayment and the employer's account shall be charged based upon the employer's failure to participate in the fact-finding interview.

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Terry Nice  
Administrative Law Judge

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Decision Dated and Mailed

rvs/rvs