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

HEATHER L ELAMMARI
1025 E DIVISION ST APT #40
OTTUMWA IA 52501-1866

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Appeal Number: 06A-UI-04828-RT
OC: 04-02-06 R: 03
Claimant: Respondent (1)

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, Cargill Meat Solutions Corporation, filed a timely appeal from an unemployment insurance decision dated April 24, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Heather L. Elammari. After due notice was issued, a telephone hearing was held on May 22, 2006, with the claimant participating. The claimant was presented by Joseph L. Walsh, Attorney at Law. Brian Ulin, Union Representative, was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary. Erica Bleck, Human Resources Associate, and Kathryn Diercks, Assistant Human Resources Manager, participated in the hearing for the employer. 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, the administrative law judge finds: The claimant was employed by the employer as a full-time production employee from May 10, 2004 until she was discharged on April 7, 2006. The claimant was discharged for allegedly violating the employer's policies concerning dishonesty, falsification, and misrepresentation during an incident on April 6, 2006. On that day the claimant came to work a few minutes late and punched in on the employer's time clock at 6:03 a.m. Since the claimant was already late and knew she would get a half a point on the employer's attendance point policy, the claimant went to one of the employer's few computers to check to see if her check had been deposited in the bank. Employees generally are to use the computer only during break time or lunchtime but because there are few computers for so many employees the computers are usually busy. While checking on the computer a supervisor, Kirk Warren, saw the claimant and asked what the claimant was doing. The claimant explained that she was late and was going to go back to the line. The claimant did not tell Mr. Warren that she had not clocked in. The claimant's shift began at 6:00 a.m. and the claimant was three minutes late when she clocked in. This conversation with Mr. Warren occurred between 6:07 a.m. and 6:11 a.m. The claimant, after getting her hand wraps, went to the line and found that the line was not yet running. Nothing more happened that day.

The next day, April 7, 2006, the claimant was told by her direct supervisor, Brad Glasser, that Terry King, another supervisor, had left instructions for Mr. Glasser to tell the claimant to go to Human Resources. The claimant went to Human Resources and met with Mr. King and the employer's witness, Kathryn Diercks, Assistant Human Resources Manager, and two union representatives. The claimant was asked about the previous day's incident. The claimant stated that she was running late and used the computer. The claimant was asked which way she walked when she checked or clocked in but the claimant could not remember and may have told the employer the wrong way. The employer checked the surveillance tape and saw that the claimant had punched in and then used the restroom and went to get her smock and gloves and then went to the computer room at approximately 6:11 a.m. Time records also show the claimant clocked in at 6:03 a.m. At that meeting the claimant did not deny that she had clocked in at 6:03 a.m. before using the computer. The members of the management at the meeting first discussed an alternative reason for disciplining the claimant but decided to discharge the claimant for violation of the employer's policies prohibiting dishonesty, falsification or misrepresentation, which according to the employer's rules in its rule book provides for a discharge upon a first violation. The rule book is reviewed in orientation with employees and posted for the employees' use. Although the employer does not permit employees to leave the line and go to other areas, in particular to use the computer, other employees have done so without discipline. The claimant received no relevant warnings for dishonesty or falsification or misrepresentation. The claimant did receive a couple of warnings for what really amounted to attendance violations. There was no other reason for the claimant's discharge other than the alleged dishonesty, falsification, or misrepresentation. Pursuant to her claim for unemployment insurance benefits filed effective April 2, 2006, the claimant has received unemployment insurance benefits in the amount of $2,210.00 as follows: $116.00 for benefit week ending April 8, 2006 (earnings $320.00); and $349.00 per week for six weeks from benefit week ending April 15, 2006 to benefit week ending May 20, 2006.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from the employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 7, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to

demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses agree that the only reason for the claimant's discharge was a violation of the employer's policies prohibiting dishonesty, falsification, and misrepresentation.

The employer cites as the claimant's violation lying to a supervisor, Kirk Warren, when she was approached by Mr. Warren while the claimant was using the employer's computer after the start of her shift. The employer's witnesses testified that the claimant told Mr. Warren that she had not clocked in but the claimant adamantly denied telling Mr. Warren this. The testimony of the employer's witnesses was hearsay and the claimant's testimony was direct and straightforward. The administrative law judge concludes that the claimant's testimony is more credible than the hearsay testimony of the employer's witnesses and, therefore, the administrative law judge must conclude that the claimant did not tell Mr. Warren that she had not clocked in. The next day, April 7, 2006, the claimant had a meeting with certain representatives from the employer and they testified that the claimant admitted that she had told Mr. Warren that she had not clocked in but the claimant adamantly denied this. The administrative law judge is constrained to conclude here that there is not a preponderance of the evidence that the claimant at any time told anyone that she had not clocked in before she was using the employer's computer. There is no other real evidence of any dishonesty or falsification and misrepresentation on the part of the claimant. Therefore, the administrative law judge concludes there is not a preponderance of the evidence that the claimant was dishonest or falsified anything or misrepresented anything and, therefore, committed no deliberate acts constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that evinced a willful or wanton disregard of the employer's interest or that were carelessness or negligent in such a degree of recurrence as to establish disqualifying misconduct.

The claimant did concede that she clocked in late and because she was already late went to the computer to use the computer since it was usually busy at break times. The claimant even seemed to concede that she probably should not have been using the computer during work time but testified credibly that other employees used that computer during work time. The administrative law judge concludes that this is really an attendance issue but the claimant was not discharged for attendance. It is true that the claimant was late when she arrived at work and the administrative law judge does not condone being tardy to work. However, there is no evidence that claimant's absences and tardies were sufficient to establish excessive unexcused absenteeism. See 871 IAC 24.32(7). More compellingly, the claimant was not discharged for her attendance or excessive unexcused absenteeism. The warnings testified to by the employer's witnesses also seemed to deal more with attendance, leaving her workstation without permission. It is true that the claimant's line was not running when she was using the employer's computer but she did not know that. The administrative law judge does not condone the claimant's behavior in using a computer when she was not on a break or when she was supposed to be at the line. However, the administrative law judge concludes here that there is not a preponderance of the evidence that such behavior rises to the level of disqualifying misconduct as defined above. Again, more compellingly, the claimant was not discharged for that.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature including the evidence

therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395 (Iowa App. 1989). The administrative law judge concludes there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

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 $2,210.00 since separating from the employer herein on or about April 7, 2006 and filing for such benefits effective April 2, 2006. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 24, 2006, reference 01, is affirmed. The claimant, Heather L. Elammari, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision the claimant has not been overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

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