**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**JAMES A LOWE**
Claimant

**ADVANCED COMPONENT**
Employer

**APPEAL NO. 08A-UI-07833-SWT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 08/03/08 R: 02**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

The employer appealed an unemployment insurance decision dated August 25, 2008, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on September 16, 2008. The parties were properly notified about the hearing. The claimant, James Lowe, participated in the hearing with a witness, Chad Wihlm. DeeDee Bright participated in the hearing on behalf of the employer.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

James Lowe worked full time for the employer as a tool room technician from January 2, 1997, to July 28, 2008. Chad Wihlm was his supervisor. Under the employer's policy, employees were entitled to 20 minutes of paid breaks if they worked less than 10 hours and 30 minutes if they worked more that 10 hours. In addition, employees were allowed an additional 30-minute unpaid lunch break at the supervisor's discretion. Employees were not required to punch out for the lunch break, it was deducted from their time. Lowe was never disciplined or counseled regarding the break policy until he was discharged.

Wihlm allowed the employees he supervised to take their unpaid breaks at anytime they had free time during their scheduled shift. He did not restrict his employees to taking their breaks on premises. There were many times that Lowe did not take an unpaid break until the end of his shift and left the premises at the end of the day to take his break. He would then return near the end of his work shift and punch out and leave work. Wihlm was aware of this practice and never told the claimant that what he was doing was improper.

In July 2008, Wihlm had talked to Lowe about eliminating the 30 minute unpaid lunch and going to a straight eight hours with a 20-minute unpaid breaks. Wihlm initiated this during the week of July 21 but did not inform Lowe, and the Lowe's working hours were not adjusted to account for the change as he was unaware that the employer was no longer deducting the 30-minute unpaid lunch.

Lowe had filed a workers' compensation claim against the employer. The employer hired a surveillance company to follow him because management suspected he had injured himself in his side business of cabinetmaking.

On July 18, 2008, Lowe attended a going-away lunch barbeque at work for an employee who was leaving the company that lasted somewhat longer than 30 minutes. Wihlm was at the lunch with Lowe and other employees. He did not say anything to employees about the time spent at the barbeque beyond the 30 minutes being counted toward their 20-minute unpaid breaks. Lowe had not taken a morning break. He followed his practice of taking his unpaid break at the end of the day and left the premises for a short period of time to run some personal errands. He returned to work for about 10 minutes and then punched out and left work at the end of his shift. He did not deliberately violate the 20-minute break policy that day. The surveillance team reported to the employer the fact that he had left the building and did some personal business at the end of the day, returned for 10 minutes, and then left again.

Lowe punched in at around 6:30 a.m. and punched out around 3:00 p.m. on July 22, 23, and 24. He did not know he had been switched to the straight eight hours with a 20-minute unpaid break and no unpaid lunch. The employer did not deduct the 30 minute unpaid lunch for these days, but Lowe did not know that.

On July 25, 2008, Lowe went with a crew to the Twin Cities Minnesota area to perform some off-site work. He punched in at 4:56 a.m. and traveled to the customer location. He did not have a morning break. He and the crew had lunch from 1:01 to 1:42 pm. Lowe understood that 30 minutes would be deducted from his time for an unpaid lunch. They traveled back and arrived at the employer's business at about 2:37 p.m. Lowe believed he was still entitled to a paid break. He left the premises on this break at about 2:48 p.m. and did some personal errands. He returned at about 3:04 p.m., punched out at 3:05 p.m., and left work. He did not deliberately violate the employer's break policy on July 25. The surveillance company reported Lowe's end-of-the day activities to management.

On July 28, 2008, the employer discharged Lowe for violating the employer's break policy and overstating his time worked on July 18 and 25, 2008.

**REASONING AND CONCLUSIONS OF LAW:**

The issue in this case is whether Lowe was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove Lowe was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment

insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof. No willful and substantial misconduct has been proven in this case. Lowe took his unpaid breaks at the end of the day on July 18 and 25, which was his practice and which was done with the knowledge of his supervisor who never instructed him to do otherwise. Wihlm admitted he allowed employees to take their paid breaks whenever they were able to and that he knew Lowe had taken breaks off-premises near the end of the workday. He admitted he had not told Lowe at the beginning of the week of July 21 that he was going to be on a straight-hour schedule with paid breaks, and Lowe's punch out times at 3:00 p.m. on July 22, 23, and 24 corroborate the claimant's testimony that he believed that he was still getting a 30-minute unpaid lunch break in addition to the paid break. Otherwise, he would have punched out at 2:30 p.m.

**DECISION:**

The unemployment insurance decision dated August 25, 2008, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Steven A. Wise
Administrative Law Judge

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Decision Dated and Mailed

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