

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAM S MUNG**  
Claimant

**APPEAL NO. 13A-UI-12481-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK CO**  
Employer

**OC: 10/06/13  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment  
871 IAC 24.10 – Employer Participation

**STATEMENT OF THE CASE:**

The employer, Swift, filed an appeal from a decision dated October 29, 2013, reference 01. The decision allowed benefits to the claimant, Dam Mung. After due notice was issued a hearing was held by telephone conference call on December 2, 2013.

The claimant provided two phone numbers. The first was tried at 11:08 a.m. and the only response was a message stating the voice mail had not yet been set up. The second number was called at 11:10 a.m. and there was no answer.

Kham Mung was to have acted as interpreter. His number was contacted several times with only a voice mail. A message was left indicating he should contact the Appeals Section for the 11:00 a.m. hearing. The only other response was a woman who said he would “call back.”

The employer participated by Human Resources Supervisor Luis Meza.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits, whether the claimant is overpaid unemployment insurance benefits and whether the employer’s account is charged due to non-participation at the fact-finding interview.

**FINDINGS OF FACT:**

Dam Mung was employed by Swift from October 12, 2009 until September 19, 2013 as a full-time production worker. On September 12, 2013, Supervisor Ceaser Romano went to the claimant’s work area but could not find him. After a search he was found sleeping in a tunnel safety area.

He was suspended by Mr. Romano under the company policy which states sleeping on the job is grounds for discharge. He was interviewed later by Interim Human Resources Supervisor

Aureliano Diaz and said he and his wife had a new baby and its crying was keeping him up at night so he was tired and decided to leave his work area to nap. He was discharged by Mr. Diaz after the end of the investigation on September 19, 2013.

Dam Mung has received unemployment benefits since filing a claim with an effective date of October 6, 2013. The employer did participate in the fact-finding interview.

The record was closed at 11:20 a.m. The claimant called in at 11:21 a.m. The administrative law judge attempted to call him again at both phone numbers at 11:22 a.m. and 11:24 a.m. with the same results as previously.

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

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 claimant was discharged for sleeping on the job. The company policy strictly prohibits this and the claimant did receive a copy of the policy during the course of his employment. The employer has the right to expect employees to be performing their regular job duties while they are on the clock. The claimant's "nesting" in another area leaving his work station unattended is conduct not in the best interests of the employer. He is disqualified.

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 § 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 employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

**DECISION:**

The representative's decision of October 29, 2013, reference 01, is reversed. Dam Mung is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible. The claimant is overpaid unemployment benefits in the amount of \$2,634.00. This must be recovered in accordance with the provisions of Iowa law.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs