

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LETTY VIRAMONTES**

Claimant

**APPEAL NO: 13A-UI-04704-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**

Employer

**OC: 03/17/13**

**Claimant: Respondent (2/R)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

Iowa Code § 96.3-7 - Overpayment

**STATEMENT OF THE CASE:**

Swift Pork Company (employer) appealed an unemployment insurance decision dated April 8, 2013, reference 01, which held that Letty Viramontes (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 29, 2013. The claimant participated in the hearing. The employer participated through Luis Meza, Human Resources Supervisor. Employer's Exhibit One was admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time accounting specialist from November 19, 2012 through March 7, 2013 when she was discharged for sleeping on the job which is a terminable offense. On March 6, 2013, a co-worker presented the employer with a picture of the claimant sleeping on the job the night before, as well as a chronological two-page list of her inappropriate comments/actions dating back to February 4, 2013. The co-worker reported the claimant was sleeping at the scale until the radio went off on February 16, 2013 at "2211" or 10:11 p.m. She said she was going to the bathroom to "sleep for a bit" at 10:14 p.m. and was gone for 15 minutes. In the hearing, the claimant admitted making that statement but claimed that she only said that because she had diarrhea and did not want to tell her co-worker the truth. At 10:31 p.m., the claimant made a comment about sleeping when she and a co-worker switched positions. She said, "Dude when we switch I'm so sleeping, I can't wake up and I can't over on scale because shaggers keep talking and I'm afraid I'm gonna piss my pants."

The co-worker also reported detailed times and dates of numerous offensive comments and profane statements made by the claimant. She admitted using profanity but testified that she thought it was acceptable because her co-worker also used profanity. The employer did not conduct a further investigation into that because the claimant admitted sleeping on the job.

The claimant filed a claim for unemployment insurance benefits effective March 17, 2013 and has received benefits after the separation from employment.

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

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on March 7, 2013 for sleeping on the job which is a terminable offense. She admitted sleeping on the job on approximately March 5, 2013 and admitted she told a co-worker on February 16, 2013 that she was going to go to the bathroom to sleep but claims she was not

telling the truth at that time. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) 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. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

**DECISION:**

The unemployment insurance decision dated April 8, 2013, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/css