

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

AMBER L GLEASON

Claimant

and

BLACK HAWK ROOF COMPANY INC

Employer

HEARING NUMBER: 17BUI-00957

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE DENIED

The Employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Amber L. Gleason, worked for Black Hawk Roof Company, Inc., initially, as a temporary employee beginning on July of 2016 (54:43), before being hired as a permanent, full-time office manager from September 19, 2016 through December 27, 2016. (11:00-11:53; 1:32:32) She was paid \$17 an hour, Monday through Friday; and her immediate supervisor was Shawn Kelly, the company owner. (12:25-12:44; 35:08; 53:45-53:56; 1:33:08) Part of Ms. Gleason's job responsibilities included doing payroll.

The Employer utilizes an app called 'About Time', which is available on company telephones and has GPS capabilities. (14:34-14:56; 56:40-56:46) When asked if she could work from home, the Employer repeatedly directed Ms. Gleason not to access the company computer and work from home to avoid any

potential hacking of the company's system which contained sensitive information. (26:22-27:45; 49:09-49:13; 1:01:15) She did not take the laptop home...nor did the Employer provide any remote desktop service to the server for which she could access. (2:01:42- 2:02:35) The Claimant did not have occasion to work on weekends when crew members sometimes worked, as the latter dealt directly with the owner or the project manager if problems arose. (46:00-46:30)

As the office manager, Ms. Gleason was the only employee who had access (22:02-22:08; 58:48-58:57) to manually input everyone's 'About Time' report onto Paylocity, the company's payroll system. (15:54-16:04; 16:08-16:35) If a crew member had no phone service in the area he was working, he had to handwrite his time on a piece of paper that he submitted to Ms. Gleason to attach to that employee's work hours for the affected pay period. (59:30-59:40; 1:08:40-1:08:49; 1:35:35-1:36:05) The Claimant did not document her own time in the same manner as everyone else. If she needed to work overtime, she was required to work at the office, which she rarely did. (48:46-48:50; 49:21-49:35; 1:08:51-1:09:05)

On December 16, 2016, the Claimant was unavailable to do payroll, as she was out attending to her sick son. (14:00-14:21; 56:48-57:13) Michael Kelly (the owner's son) did payroll on December 21, 2016. (57:20) He noted some discrepancies in the Claimant's time reporting on Paylocity, i.e., Ms. Gleason had been giving herself more hours than what she reported on 'About Time'. (15:23-15:40; 57:22-57:37) He reported his findings to Shawn Kelly who further investigated the matter. (15:43-15:48; 16:48-17:00) After going back through her time-keeping system since she started in September, the Employer found the Claimant had routinely added hours in Paylocity over her 'About Time' recorded hours, in part, as follows: (17:24-22:25)

<u>Check date</u>	<u>Week Covered</u>	<u>'About Time'</u>	<u>'Paylocity' Entry</u>
10/21/16	10/09 - 10/15	38.4	38.4 + 5.5 vacation
10/28/16	10/16 - 10/22	37.55	40 + 6 overtime
12/09/16	11/17 - 12/03	40.0	40 + 10 overtime
12/16/16	12/04 - 12/10	41.51	40 + 10 overtime

After investigating the matter and over the holiday weekend, the Employer concluded that based on the discrepancies found in her time-keeping records, Ms. Gleason had been claiming work hours exceeding those actually worked, which resulted in a windfall of \$1304 in overtime pay that she was not entitled to. (23:29-24:00) On December 27th, the Employer confronted her about the discrepancies to which she explained that she recorded her time the way Bret Newman, the previous office manager who also authored the company manual, trained her. (26:00-26:14; 45:25-45:27) She also indicated that Brent authorized her to work from home (26:00-26:16), which the Employer knew was untrue based on a previous phishing/hacking scare and prior discussions with Brent. (59:50-1:00:45) The Claimant had previously requested to do additional work at home to which the Employer vehemently told her no. (1:01:15-1:01:29) It should be noted that Mr. Newman, a 14-year employee, was terminated from his employment because of theft/misappropriation of funds that did not involve payroll issues prior to the Claimant's being permanently hired. (40:35-40:42; 54:19-54:23; 1:10:54-1:11:02)

The Employer gave Ms. Gleason two choices: 1) To submit a check for all the overtime hours that were fraudulent; or 2) that the Employer would call the police and have her arrested if she did not give him a check that day to repay the company. (24:35-24:58; 1:01:37-1:01:41; 1:22:50; 1:25:00-1:25:07) Without hesitation, Ms. Gleason agreed to write him a check, which she promptly did, gathered her personal belongings and left the premises. (1:01:43-1:02:23) Later, when the Employer tried to cash the check, he was unable due to insufficient funds. When he talked to her about the check, she responded that he would "...just have to turn it over to the police." (1:02:34-1:03:17) Ms. Gleason's last day employed was December 27, 2017.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant 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 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Employer's version of events.

In the instant case, Ms. Gleason provided testimony regarding her initial training on where she could work and how to keep track of her time, which the Employer vehemently refuted. First off, even if Brent had told her she could work from home, he had no authority to do so, as he was not her supervisor. Even if we were to believe that she mistakenly assumed Brent was her supervisor that belief was no longer reasonable in light of the fact he was terminated from employment by September when she was hired as his replacement.

Secondly, Mr. Kelly immediately corrected her 'erroneous' understanding at the time of her permanent hiring when he made it clear she could not work from home, nor could she access the computer outside of the office for fear of potential hacking of their system based on their previous phishing scare. Mr. Kelly was well aware of this incident. Thus, Ms. Gleason's testimony that she was authorized to work from home in which she allegedly accumulated overtime hours is not credible.

The Claimant's explanation that she kept track of her alleged overtime hours on post-it notes as trained by Brent is also not credible. Why would Brent train her (also an hourly employee) not to track her time in the same manner as other hourly employees? It goes against practical business prudence. According to the Employer, overtime hours with explanations were to be hand-written and attached to employees' time reports for the Claimant to transfer to Paylocity. This way the Employer also had access to this information so he could justify why an employee had overtime hours requiring extra pay. The only person who couldn't provide overtime explanations to the Employer was Ms. Gleason, as she was the only person who initially controlled this information when she transferred 'About Time' information into Paylocity.

There is nothing in the record to show that the Employer ever had access to Ms. Gleason's alleged post-it notes. Based on her method of time-keeping for herself, she could never substantiate her overtime to the Employer. Thus, we agree with Mr. Kelly's conclusion that Ms. Gleason's work hours were not properly reflected in the company's time-keeping system used to clock employees in and out, and she had not reported those overtime hours separately to the company as other employees were expected to do and had done. Additionally, we find the Employer's fervent denial credible that Ms. Gleason was never told that she had two weeks of paid vacation at the time of hire. (1:51:30-1:52:15) Thus, any hours paid for vacation were unauthorized, and falsely acquired as well.

Ms. Gleason's argument she was never warned or put on notice that her personal time-keeping practices were against company procedures lacks merit. None of this came to light until the Claimant was off work beginning in mid-December, and another employee had to do payroll on December 21, 2017. She should have known that she was acting outside protocol every time she completed her own payroll record when she failed to provide the required overtime documentation like she did for every other hourly employee. The fact that she attributed her overtime to allegedly working from home was also against the company interests especially in light of the Employer's repeated directives not to work from home. The Claimant failed to prove to the Employer that she had in fact worked the hours above what was shown on 'About Time'. Her immediate concession to hand over a check to make good on her fraudulence makes it more

probable than not that she knew she was in the wrong.

Based on this record, we conclude that the Employer satisfied their burden of proof. The fact that the Employer did not terminate her until December 27th does not detract from the currentness of her actions. The Employer discovered her misdeeds on December 21st, and after investigation, she was terminated several days later. This timeframe is not unreasonable in light of the holiday weekend.

DECISION:

The administrative law judge's decision dated March 10, 2017 is **REVERSED**. The Claimant was discharged for disqualifying reasons. Accordingly, the Claimant is denied benefits until such time she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. See, Iowa Code section 96.5(2)"a".

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision. There is no sufficient cause why the new and additional information submitted by the Employer was not presented at hearing. Accordingly all the new and additional information submitted has not been relied upon in making our decision, and has received no weight whatsoever, but rather has been wholly disregarded.

Kim D. Schmett

Ashley R. Koopmans**DISSENTING OPINION OF JAMES M. STROHMAN:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the administrative law judge's decision in its entirety.
