

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
Website: eab.iowa.gov**

CRAIG A FREISINGER

Claimant

and

BIMBO BAKERIES USA INC

Employer

: **APPEAL NUMBER:** 23B-UI-05542

: **ALJ HEARING NUMBER:** 23A-UI-05542

:

: **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

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. All members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

James M. Strohman

Ashley R. Koopmans

DISSENTING OPINION OF MYRON R. LINN:

I respectfully dissent from the majority decision of the Employment Appeal Board. After careful review of the record, I would reverse the decision of the administrative law judge.

The Code of Iowa gives as an example of misconduct “[i]ntentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.” Iowa Code §96.5(2)(d)(14). While the Claimant did not intend to fall asleep, and he may have not known that he should not leave the premises without clocking out, he did more than this. He returned to work for the sole purpose of clocking out, but didn’t contact anyone. And then he failed to tell his supervisors on his final day, even up to the end of that day. By that point I conclude that the evidence shows an intentional misrepresentation of time worked to include the sleeping.

I note that the Iowa Supreme Court has made clear that even when a party with the burden of proof fails to appear at hearing it is still possible for that party to carry its burden of proof through evidence introduced by the opposing party or through review of the file. This was precisely the case in the decision of the Iowa Supreme Court in *Hy Vee v. Employment Appeal Board*, 710 N.W.2d 1 (Iowa 2005). In that case the claimant quit claiming racial harassment. Such a claimant has the burden of proof. Iowa Code §96.6(2). (This is the same code section that places the burden of proof on the Employer in the case at bar.) Nevertheless the Supreme Court found that “[d]espite the unorthodox method in which the record was presented, we believe substantial evidence supports the board's finding of intolerable or detrimental working conditions.” *Hy Vee* at 3. The Court observed that “[t]he fact that the evidence was produced by Hy-Vee, and not by the claimant, does not diminish the probative value of it.” *Hy Vee* at 3.

I also note that this Board “is not required to accept as a verity uncontradicted testimony, but might well scrutinize closely such testimony as to its credibility, taking into consideration all the circumstances throwing light thereon, such as the interest of the witnesses, remote or otherwise.” *Kaiser v. Stathas*, 263 N.W.2d 522, 526 (Iowa 1978); accord *Jackson v. Roger*, 507 N.W.2d 585, 589 (Iowa App. 1993); *Miller v. Eichhorn*, 426 N.W.2d 641, 642 (Iowa App. 1988); *Daboll v. Hoden*, 222 N.W.2d 727 (Iowa 1974); *Schmitt v. Jenkins Truck Lines, Inc.*, Iowa, 170 N.W.2d 632, 643 (Iowa 1969); I.R. App. Pro. 6.904(3)(q) (“Even when the facts are not in dispute or contradicted, if reasonable minds might draw different inferences from them a jury question is engendered.”); *Ritchey v. Iowa Employment Security Commission*, 216 NW 2d 580, 584 (Iowa 1974). (Agency “had to consider this evidence, although having considered it, the commission was not bound to believe it.”). Based on my weighing of the evidence, I would find that by the time the Claimant was fired he had acted intentionally.

Myron R. Linn