

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

NAOMI S LOPEZ  
715 NOBLE ST  
MARSHALLTOWN IA 50158-3064

SWIFT & COMPANY  
c/o EMPLOYERS UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000

Appeal Number: 06A-UI-03501-HT  
OC: 02/26/06 R: 02  
Claimant: Respondent (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Swift, filed an appeal from a decision dated March 14, 2006, reference 01. The decision allowed benefits to the claimant, Naomi Lopez. After due notice was issued a hearing was held by telephone conference call on April 18, 2006. The claimant provided a telephone number of (641)351-4176. That number was dialed at 3:01 p.m. and the only response was an voice mail which clearly identified the number as being the same one given by the claimant. A message was left indicating the hearing would proceed without the claimant's participation unless she contacted the Appeals Section at the toll-free number prior to the close of the

record. By the time the record was closed at 3:13 p.m. the claimant had not responded to the message and did not participate in the hearing. The employer participated by Human Resources Director Cheryl Hughlette.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Naomi Lopez was employed by Swift from July 14, 1998 until February 27, 2006. She was a full-time production worker on the first shift kill floor operating the steam vac. It is her job to "vacuum" the hog carcasses to remove fecal matter and other contaminates.

Ms. Lopez had received verbal and written warnings for insubordination on June 14 and July 11, 2005, for refusing to follow the instructions of her supervisor. A final written warning was given on February 10, 2006, for poor job performance. She was not vacuuming the hogs and USDA had rejected a number of them. She was advised her job was in jeopardy.

The employer assigned a trainer to her on February 16, 2006, to make sure she understood the work she was to do. While the trainer was there she made no mistakes and did not miss any hogs, but as soon as the trainer left, she missed 6 hogs. The employer accommodated her request for more light in the work area on February 17, 2006, but her performance still did not improve.

On February 24, 2006, she was brought to the human resources department for failure to vacuum the hogs correctly again. She would do one and then let four or five pass by without touching them. The USDA again rejected many of the hogs. Ms. Lopez was suspended for three days pending investigation since she was at the discharge level.

Human Resources Director Cheryl Hughlette investigated by talking with the claimant's supervisor, two quality assurance inspectors and five members of her work crew. The work crew members all said Ms. Lopez had been "yelling and jumping around" rather than doing her work. When the claimant was interviewed by Ms. Hughlette and she admitted to "yelling and jumping around" because it was Friday and payday and she was happy. Her explanation as to why she did not vacuum all the hogs was that the four other crew persons, the "final trimmers" did not have enough to do and they could do what she missed. It is not the job of the trimmers to vacuum the hogs. The claimant was discharged for failing to perform her job as required.

The record was closed at 3:13 p.m. At 3:20 p.m. the claimant called and requested to participate. She maintained she was at home and did not hear the phone ring. She also acknowledged she had been told by the Appeals Section not to wait more than five minutes after the scheduled start time for the hearing to call back if she did not hear from the judge but did not offer an explanation as to why she waited 20 minutes instead of five.

Naomi Lopez has received unemployment benefits since filing a claim with an effective date of February 26, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 had been advised her job was in jeopardy as a result of her failure to perform her job duties. It is evident the claimant was capable of performing her job satisfactorily as she did so without any mistakes when she was being observed by the trainer. Given the fact she began to make mistakes as soon as the trainer left indicates she simply refused to do the work to the best of her ability. Her explanation that the trimmers on her crew could do what she missed further indicates a person who is unwilling to accept responsibility for doing her job, content to leave it to others to do her work for her. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be

credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not. The claimant was not available at the phone number she had provided when the hearing was to begin. She also failed to follow the instructions from the Appeal Section not to wait more than five minutes after the scheduled start time to call back if the judge had not contacted her. Her failure to follow instructions and to be available at the time the hearing was scheduled does not constitute good cause to reopen the record under 871 IAC 26.14(7).

DECISION:

The representative's decision of March 14, 2006, reference 01, is reversed. Naomi Lopez is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$1,992.00.

bgh/tjc