

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIMOTHY E SHOLLEY
Claimant

APPEAL NO: 17R-UI-11588-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARCHER DANIELS MIDLAND CO
Employer

OC: 08/13/17
Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery Benefit Overpayment
871 IACR 24 (10) – Employer represented participation in Fact-finding Interview

STATEMENT OF THE CASE:

Archer-Daniels-Midland Co, the employer, filed an appeal from the August 29, 2017, reference 01 unemployment insurance decision that allowed benefits to the claimant. A telephone conference hearing was held on September 26, 2017. The claimant did not participate. The employer participated through Mr. Michael Kuntz, Plant Manager and Production Engineer Lucas Reibe. On September 27, 2017 and administrative law judge decision was entered reversing the August 29, 2017, reference 01 decision, finding that the claimant was discharged from employment due to job related misconduct. Benefits were withheld, and it was determined that the claimant was overpaid \$2,275.00 in unemployment insurance benefits and he was liable to repay that amount to the Agency. Because the employer had participated in the fact-finding interview the employer was not charged for the benefits. Mr. Sholley appealed to the Employment Appeal Board. The Employment Appeal Board remanded the case to the Appeals Section to provide a due process hearing and an appealable decision.

Pursuant to the remand order, a telephone conference hearing was scheduled for and held on November 30, 2017. The claimant participated personally. The employer participated by Mr. Michael Kuntz, Plant Manager and Mr. Lucas Reibe, Production Engineer. Employer's Exhibits A through F were admitted into the hearing record.

ISSUE:

The issues are:

Was the claimant discharged for job related misconduct sufficient to warrant the denial of unemployment insurance benefits?

Has the claimant been overpaid unemployment insurance benefits, and if so can the repayment of those benefits to the Agency be waived?

Can charges to the employer's expense account be waived?

FINDINGS OF FACT:

The administrative law judge, having considered all of the evidence in the record, finds that: Timothy Sholley was employed by Archer-Daniels-Midland Co. from July 16, 2014 until August 11, 2017 when he was discharged from employment. Mr. Sholley worked as a full-time machine operator I and was paid by the hour.

On August 10, 2017, Lucas Reibe, a production engineer, entered the production area and smelled a machine over-heating. Mr. Reibe examined the machines in the area, and discovered product stuck in one of the machines causing the machine to over-heat. Because of the heat, Mr. Reibe was concerned that the machine might catch fire. Mr. Reibe began to look for Mr. Sholley, the operator whose job was to be monitoring machines in the area. Mr. Reibe found the claimant sitting in a control room, cell phone in hand. Because company policy strictly prohibits employee's from using or possession of cell phones anywhere in the employer's facility, except in offices or locker rooms, Mr. Reibe informed Mr. Sholley that he would be written up for the offense. Mr. Reibe then quickly went about the tasks of shutting down the other machines in the production area that Mr. Sholley was to have been monitoring. Claimant's only explanation to Mr. Reibe was that he was "using his cell phone as an alarm clock".

The claimant was aware of the company policy which strictly prohibited employees from using or possessing cell phones in the plant except in designated areas. The claimant had been trained on the policy and the policy annually reviewed with employees. Mr. Sholley had been specifically warned about cell phone use in the plant in December, 2015 after he had been observed violating the rule.

The Archer Daniels-Midland Co. places high importance on the rule that prohibits possession and use of cell phones. The work environment contains highly flammable chemicals and any type of spark from any type of electrical device, such as a cell phone, can trigger an explosion or contaminate food products being prepared. Mr. Reibe reported the over-heated machine and Mr. Sholley's unauthorized use of a cell phone. A short time later, Mr. Sholley was escorted from the plant and suspended pending a review by the company.

Mr. Sholley was discharged by a letter dated August 11, 2017. In the discharge letter, the company referenced that it was Mr. Sholley's responsibility as the operator in the building to make rounds and to ensure equipment was operating properly, and that while the claimant was using his phone, a machine in the claimant's area was malfunctioning and drastically over-heating. The discharge letter also reflects that Mr. Sholley had been issued a prior warning about cell phone use on December 26, 2015, and that the claimant had been suspended for sleeping on the job in May of 2016. At the time of the final incident, Mr. Sholley was on a final warning for failure to follow another company safety rule.

Mr. Sholley asserts that he did not violate the company's cell phone policy because the cell phone in his possession could not receive or send calls and he only used the battery operated device as an alarm clock and a place to store telephone numbers. The claimant also believes that he was not adequately warned that violation of the cell phone rule could result in termination and he was not provided a Union representative to act on his behalf.

Mr. Sholley filed a new claim for unemployment insurance benefits with an effective date of August 29, 2017. Mr. Sholley filed for and received a total of \$2,275.00 in unemployment insurance benefits for the weeks between August 13, 2017 and September 16, 2017. Both Mr. Sholley and the employer participated in a fact-finding interview on August 28, 2017.

REASONING AND CONCLUSIONS OF LAW:

Having considered all the evidence in the record, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant was discharged from employment due to job related misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

In discharge cases, the employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

For unemployment insurance purposes, misconduct in connection with the work amounts to a deliberate act and a material breach of duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior that the employer has a reasonable right to expect of its employee or an intentional and substantial disregard of the employer's interests or standards of behavior. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or capacity, inadvertence or in adhering negligence in isolated instance, or good faith errors in judgment or discretion are not deemed to constitute work connected misconduct. See 871-IACR 24.3(2) (1) (a).

In the case at hand, the claimant's was discharged for violating an important employer safety rule that prohibits cell phones from being used or possessed anywhere in the employer's facility except in locker rooms or designated offices. The employer's work rule was reasonable and Mr. Sholley was aware of it. The rule had been covered at the time Mr. Sholley was hired and reviewed annually by the company. In addition, the claimant had received a specific warning about violating the company's cell phone rule on December 27, 2015.

Mr. Sholley maintains the warning was not sufficient. The administrative law judge does not agree. The purpose of the warning was to provide the notice to Mr. Sholley that the employer expected him to conform to certain expectations or face disciplinary actions or discharge. Employer's Exhibit F, the claimant's termination letter, further establishes that the employer also noted Mr. Sholley had failed to monitor and ensure that the equipment in his area was operating properly, that the claimant had previously been warned and suspended for other rule violations such as sleeping on the job, and safety violations. Employer's Exhibit F also reflects that at the time of the final incident, he was on a final warning and had been placed on notice that any other further violations would result in his termination of employment.

Although the administrative law judge is aware Mr. Sholley maintains that his cell phone could not send or receive calls, the administrative law judge concludes the battery operated device, nonetheless constituted an electronic safety hazard in the work environment and the claimant's testimony that he did not know that he had the cell phone strains credibility. The claimant was observed sitting in the control room with the cell phone in his hand instead of devoting his attention to monitoring machines in his work area.

The employer has presented substantial and credible evidence that the claimant violated the company rule by bringing an electronic device into his work area after he had been specifically warned in the past. The claimant was personally observed by Mr. Reibe sitting with the cell phone in his hand while machinery in the claimant's work area was malfunctioning.

The claimant was discharged for work connected misconduct. Accordingly, claimant is disqualified for unemployment insurance benefits until he has worked and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received can constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,275.00 after filing a new claim for unemployment insurance benefits with an effective date of August 29, 2017 for the week ending dates between August 13, 2017 and September 16, 2017. The administrative record also establishes that the employer did participate in the fact-finding interview.

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 section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, is 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 unemployment insurance decision dated August 29, 2017, reference 01 is reversed. Claimant was discharged for work connected misconduct. Unemployment insurance benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid unemployment insurance benefits in the amount of \$2,275.00 and is liable to repay that amount. The employer's account shall not be charged based upon the employer's participation in the fact-finding interview

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn