

**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**

**CURTIS R GIDEON
405 E WARREN
MT PLEASANT IA 52641**

**LOMONT MOLDING INC
EAST INDUSTRIAL PARK
PO BOX 601
MT PLEASANT IA 52641-0601**

**Appeal Number: 06A-UI-03521-HT
OC: 12/25/05 R: 04
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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge
Section 96.3.7 – Overpayment

STATEMENT OF THE CASE:

The employer, Lomont Molding, filed an appeal from a decision dated March 22, 2006, reference 01. The decision allowed benefits to the claimant, Curtis Gideon. After due notice was issued a hearing was held by telephone conference call on April 17, 2006. The claimant provided a telephone number if (319)385-2347. That number was dialed at 8:02 a.m. and the only response was a voice mail. The number was dialed again and the same voice mail responded. The number dialed was the same as on the DBRO screen as provided by the claimant when he filed his initial claim for benefits. A message was left at 8:04 a.m. indicating the hearing would proceed without the claimant's participation unless he called the toll-free number prior to the close of the record. By the time the record was closed at 8:26 a.m. the

claimant had not responded to the message and did not participate. The employer participated by Assistant Human Resources Director Kathy Schimmelpfennig and Supervisor Phil Tone. Exhibit One was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Curtis Gideon was employed by Lomont from January 21, 1195 until March 7, 2006. He was a full-time material handler working 4:00 p.m. until midnight. His job was to take pallets of raw material to the production line and to wrap pallets of finished product and transport them to the warehouse.

Mr. Gideon had received a number of verbal warnings from Supervisor Phil Tone about his slow work habits. There would be many pallets left to be processed at the end of his shift, although the other material handlers customarily had only one or two which had been delivered too late in the shift to be processed. The claimant was warned he would not be allowed overtime to complete his work. He was also given verbal warnings about his chronic tardiness.

For the last six months of his employment Mr. Gideon's work performance improved dramatically and he customarily had all of the pallets processed by the end of his shift. On March 6, 2006, he was once again tardy and Mr. Tone issued him a written warning. He had been tardy 24 times since January 30, 2006, and was advised his job was in jeopardy.

For that shift the claimant was so far behind he had to stay two extra hours to catch up on the 18 pallets left at the regular quitting time. The other two material handlers completed all of their work and the work load was the same for all of them. The supervisors conferred and decided the failure to complete his work was retaliation for the written warning issued to him at the beginning of the shift. The work load was similar to what he had been doing in the last few months when his performance had improved. Mr. Tone notified him on March 7, 2006, he was discharged.

Curtis Gideon has received unemployment benefits since filing an additional claim with an effective date of March 5, 2006.

The record was closed at 8:26 a.m. At 8:52 a.m. the claimant called and requested to participate. He had received the notice of the hearing but forgot April 17, 2006, was the date of the hearing and "spaced it off."

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he 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 employer has asserted the claimant deliberately slowed down his work on March 6, 2006, in retaliation for the written warning on his chronic tardiness. Mr. Gideon did not participate in the hearing to provide any alternative explanation for have over 18 pallets left at the end of his shift. This was not a continuation of the poor work performance he had displayed in the past as he had proven, for some months, he was capable of performing his job in a timely and efficient manner. The administrative law judge concurs with the employer's assessment that the claimant was slowing down his work deliberately, causing overtime to be paid and work to be delayed, in retaliation for the written warning.

Refusal to work to the best of one's ability 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 he 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 received the notice and knew the time and date and provided a telephone number where he could be contacted. His failure to be available at the number provided at the scheduled time was due to forgetfulness on his part and this does not constitute good cause to reopen the record under 871 IAC 26.14(7).

DECISION:

The representative's decision of March 22, 2006, reference 01, is reversed. Curtis Gideon is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount provided he is otherwise eligible. He is overpaid in the amount of \$1,072.00.

bgh/tjc