

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TIMOTHY J KEELE
Claimant

LOWE'S HOME CENTERS LLC
Employer

APPEAL 19A-UI-08299-JC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/22/19
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer/appellant, Lowe's Home Centers LLC., filed an appeal from the October 17, 2019 (reference 01) Iowa Workforce Development ("IWD") unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on November 13, 2019. The claimant did not respond to the notice of hearing to furnish a phone number with the Appeals Bureau and did not participate in the hearing. The employer participated through Bobbi Weepie, assistant manager.

The administrative law judge took official notice of the administrative records including the fact-finding documents. Employer Exhibit 1 was admitted. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a stock associate and was separated from employment on September 22, 2019, when he was discharged.

The claimant's primary job duties were to remove and stock freight that arrived to the employer premises. The claimant had been issued warnings in the past for failing to complete his job duties, including on January 15, 2019 and June 7, 2019. The claimant was also counseled for sleeping on the job in connection with the June warning. The claimant asserted he had self-diagnosed narcolepsy but had not been to a doctor for a diagnosis. The final incident occurred

on September 13, 2019 when the claimant was observed asleep with his head down by management. He was subsequently discharged.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,854.00, since filing a claim with an effective date of September 22, 2019. Alex Starks, claims analyst for Thomas and Company/Thomas and Thorngren Inc., the employer's unemployment vendor, was called and a voicemail was provided to allow the employer's participation in the fact-finding interview. Mr./Ms. Starks did not respond. There is no evidence that the employer attempted to submit written participation in lieu of attending the fact-finding interview. Alex Starks did not attend the hearing to explain why the employer did not respond to the call or voicemail for the fact-finding interview. Ms. Weepie had no details about the employer's non-participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.*

Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witness and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Sleeping on the job on two occasions, one year apart, can constitute job misconduct. *Hurtado v. Iowa Dep't of Job Serv.*, 393 N.W.2d 309 (Iowa 1986). An employer can reasonably expect that an employee will be working when scheduled. In this case, the claimant was issued multiple warnings for lack of productivity. This was coupled with a prior warning for sleeping on the job. The claimant did not provide the employer any evidence that the sleeping was related to a verified medical illness or condition. The claimant did not attend the hearing to refute the employer's evidence. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for misconduct. Benefits are denied.

The next issues to resolve are whether the claimant must repay benefits and whether the employer's account can be relieved of charges.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits in the amount of \$1,854.00. 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 employer failed to participate in the fact-finding interview and did not provide evidence that it was due to Agency or Postal Service error. Therefore, the employer cannot be relieved of charges. Because the claimant did not receive benefits due to fraud or willful misrepresentation and the employer failed to participate in the fact finding interview, the claimant is not required to repay the overpayment, and the employer remains subject to charge for the overpaid benefits.

DECISION:

The October 17, 2019, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid benefits in the amount of \$1,854.00 but is not required to repay the benefits because the employer did not satisfactorily participate in the fact-finding interview. Because the employer did not satisfactorily participate in the fact-finding interview, its account remains subject to charge for the overpaid benefits.

Jennifer L. Beckman
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Decision Dated and Mailed

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