

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSEPH E BEVERLIN
Claimant

APPEAL NO. 09A-UI-10350-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

**Original Claim: 06/14/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

West Liberty Foods LLC filed a timely appeal from a representative's decision dated July 10, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone hearing was scheduled for and held on August 5, 2009. The claimant participated personally. The employer participated by Ms. Nickie Bruno, human resource generalist.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: Joseph Beverlin was employed as a maintenance mechanic for West Liberty Foods LLC from May 20, 2007, until June 10, 2009, when he was discharged for failing to be available to perform services for the employer on the night of June 1, 2009. Mr. Beverlin was employed full-time and worked on the company's third shift.

A decision was made to terminate Mr. Beverlin when he could supply no reasonable explanation to the employer to account for his absence from the work location for the majority of the night of June 1, 2009. Although the claimant had been assigned to perform work duties, Mr. Beverlin could not be found on the entire premises, even though the claimant's supervisor spent an extensive amount of time searching for the claimant. Security personnel also sought the claimant but could not find him. The employer's timekeeping apparatus did not show that the claimant had clocked out.

Subsequently, Mr. Beverlin provided the excuse that he had been "sleeping" in a remote upstairs break area through the entire night. The claimant maintains that he did not hear repeated radio attempts to contact him nor did he receive or note repeated cell phone calls made to his number by his supervisor. Other employees who were determined to be in that

portion of the plant during the night hours specifically indicated to the company that they did not see Mr. Beverlin in the location where he claimed to be.

It is the claimant's further position that when he attempted to clock out, the timekeeping apparatus would not allow him to clock out. He therefore planned to inform the company at a later date of that problem. It is the claimant's position that through fortuitous circumstance his ride happened to be available at 6:30 a.m. when Mr. Beverlin awoke from "sleeping" and immediately caught a ride home.

REASONING AND CONCLUSIONS OF LAW:

For the reasons stated herein, the administrative law judge concludes that the claimant was discharged for misconduct in connection with his work.

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.

In this case, the claimant was discharged when the employer could not find the claimant at any location in its facility through the majority of the entire night of June 1, 2009. The claimant was on duty, clocked in, and expected to be performing work for the employer. Although the claimant's supervisor attempted to contact Mr. Beverlin in person by company radio and by cellular telephone, he received no reply from the claimant. Neither the supervisor nor security personnel could locate the claimant at any location in the facility. The employer thus reasonably

concluded the claimant had not been on the work site although he was punched in. The employer's timekeeping apparatus did not show that the claimant punched out that morning.

Although the administrative law judge is aware of the explanation provided by Mr. Beverlin, the administrative law judge concludes that the claimant's explanation strains credibility.

The claimant's failure to be at work and performing services for the employer during the time that he was clocked in and receiving pay from the company showed a disregard for the employer's interests and standards of behavior and thus was disqualifying under the provisions of the Iowa Employment Security Act. Unemployment insurance benefits are withheld.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The issue of whether the claimant must repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

DECISION:

The representative's decision dated July 10, 2009, reference 01, is reversed. The claimant was discharged for misconduct and is disqualified from receiving benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he meets all other eligibility requirements of Iowa law. The issue of whether the claimant must

repay the unemployment insurance benefits he has received is remanded to the Unemployment Insurance Services Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw