

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DELANEY R LEWIS**  
Claimant

**APPEAL NO. 13A-UI-10440-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAREWAY STORES**  
Employer

**OC: 08/18/13**  
**Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment  
871 IAC 24.50(10) – Employer Participation

**STATEMENT OF THE CASE:**

The employer, Fareway, filed an appeal from a decision dated September 12, 2013, reference 01. The decision allowed benefits to the claimant, Delaney Lewis. After due notice was issued a hearing was held by telephone conference call on October 8, 2013.

The claimant provided a telephone number to the Appeals Section. That number was dialed at 7:59 a.m. and the only response was a voice mail. A message was left indicating the hearing would proceed without the claimant's participation unless she contacted the Appeals Section prior to the close of the record. By the time the record was closed at 8:15 a.m. the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

The employer participated by Store Manager Randy Frisch and was represented by Human Resources Generalist Theresa McLaughlin.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits, whether the claimant is overpaid unemployment insurance benefits and whether the employer's account is charged due to non-participation at the fact-finding interview.

**FINDINGS OF FACT:**

Delaney Lewis was employed by Fareway from January 22, 2013 until July 21, 2013 as a full-time cashier. At the time of hire she received the employee handbook. The employer's policies include that any merchandise consumed or used on the premises must be paid for beforehand. Violation of this policy is a dischargeable offense.

On July 2, 2013, Ms. Lewis took a container of macaroni and pea salad from the meat counter and went to the break room. She ate the salad there, discarded the container in the trash and went back to work. Store Manager Randy Frisch was notified and he went to the break room where he found the container in the trash.

Ms. Lewis was called to the office and admitted she had taken the salad without paying for it but "didn't know why" she had not paid for it. He notified her at that time she was discharged for eating the product without paying for it first.

Delaney Lewis has received unemployment benefits since filing a claim with an effective date of August 18, 2013. The employer did participate in the fact-finding interview.

The record was closed at 8:15 a.m. At 12:13 p.m. the claimant called and requested to participate. The claimant received the hearing notice prior to the October 8, 2013 hearing. She had received the notice and knew the time and date of the hearing, but decided to sleep in and did not answer the phone.

#### **REASONING AND CONCLUSIONS OF LAW:**

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 was discharged for violation of a known company rule. The employer has the right to protect its assets and requiring payment for goods before use or consumption by employees is a reasonable policy. The claimant knowingly violated the policy and made no effort to pay for the salad either before or after consuming it. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer. The claimant is disqualified.

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 § 96.3-7-a, -b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was 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.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Although the claimant may have intended to participate in the hearing, she decided to sleep in and not answer the phone at the scheduled time of the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

**DECISION:**

The representative's decision of September 12, 2013, reference 01, is reversed. Delaney Lewis is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount in insured work, provided she is otherwise eligible. The claimant is overpaid unemployment benefits in the amount of \$535.00. This must be recovered in accordance with the provisions of Iowa law.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/pjs