

**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**

**PHILLIP B LINDSAY
PO BOX 532
LAKE PARK IA 51347**

**BERKLEY INC
1900 – 18TH ST
SPIRIT LAKE IA 51360**

**Appeal Number: 06A-UI-00300-HT
OC: 12/04/05 R: 01
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, Berkley, filed an appeal from a decision dated December 28, 2005, reference 01. The decision allowed benefits to the claimant, Phillip Lindsay. After due notice was issued a hearing was held by telephone conference call on February 1, 2006. The claimant participated on his own behalf. The employer participated by Human Resources Director Shelly Krause, Human Resources Benefits Manager Carla Jones and Bait Focus Factory Director Jeff Rehder. 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: Phillip Lindsay was employed by Berkley from July 25, 2003 until December 6, 2005. He was a full-time molder operator.

The claimant had been counseled by Factory Director Jeff Rehder in October or November 2005 when he had sprayed fish oil in the lockers of co-workers. Mr. Lindsay maintained it was an accident but he never reported or admitted to it until the factory director held a meeting about the incident a week later.

On December 2, 2005, the claimant brought brownies into work which were laced with Ex-Lax. This was reported to Mr. Rehder by another employee and investigation pointed to Mr. Lindsay. When confronted the claimant admitted to doing this, saying it was to "get even" with employees who had been allegedly harassing his girlfriend. He also stated "it was better than putting a piece of lead in their head." Mr. Rehder counseled both the claimant and the girlfriend and told them that any complaints of harassment needed to be taken to management, and retaliation was not acceptable. He also told the claimant the matter would be subject to further discipline after he consulted with human resources.

Mr. Lindsay was suspended pending the investigation. During this time it was reported to Mr. Rehder the claimant had been heard making remarks in the employee break room that he "should just bring in a gun and blow them all to hell." The claimant maintains he was only talking about a video game, but the alarm it caused other employees was considerable.

At the end of the investigation the claimant was discharged by Mr. Rehder and Human Resources Director Shelly Krause.

Phillip Lindsay has received unemployment benefits since filing a claim with an effective date of December 4, 2005.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The claimant admitted to bringing in brownies laced with Ex-Lax. He maintained it was partly a joke and partly to get even with people who were allegedly harassing his girlfriend. Regardless of the reason it was unacceptable conduct. As a joke it was in poor taste and potentially harmful to others, and as retaliation, completely out of line. In any event, it seems to the judge that both of these are mutually exclusive as far as motive.

The problem was exacerbated by his comment about putting a "piece of lead in their head" along with the prior incident with the fish oil in the lockers. Although Mr. Lindsay says the fish oil was an accident, the judge finds this to be highly suspicious, especially as he did not confess what happened to the co-workers or the managers until he was confronted about it. This would tend to indicate it was not an accident.

In addition, the threats of violence caused other employees to be concerned about their safety. The employer has the obligation to provide a safe work environment for all employees and the claimant's conduct interfered with its ability to do so. This 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.

DECISION:

The representative's decision of December 28, 2005, reference 01, is reversed. Phillip Lindsay 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 \$1,163.00.

bgh/kjf