

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHNNIE L HAWKINS

Claimant

APPEAL NO. 10A-UI-05153-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

**Original Claim: 02/28/10
Claimant: Respondent (2-R)**

Section 96.5-2-a – Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated March 23, 2010, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 19, 2010. The employer participated by Kevin McGraw, warehouse manager, and Pat Parkhill, warehouse superintendent. The claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Kevin McGraw and the testimony of Pat Parkhill.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant was overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates a cold storage facility located in Sioux City, Iowa. The claimant was hired on February 3, 2009, as a full-time high lift driver. His last day of work was February 16, 2010. He was terminated on February 16, 2010, for sleeping on the job.

The incident that led to the claimant's termination occurred on February 16, 2010. The claimant could not be found at the worksite and several employees were looking for him. He was discovered sleeping on the dock under a stack of cardboard. A photograph was taken of the claimant while he was still sleeping and this photograph was forwarded to Pat Parkhill, the warehouse superintendent. The claimant was sent home and written up.

Mr. Parkhill spoke to the claimant the next day. The claimant had no explanation for why he was sleeping on the job. The claimant's actions were deemed to be gross misconduct under the employer's work rules. The claimant had chosen to sleep in a very dangerous position and could have been killed because product was loaded on the rack where he was sleeping. The claimant had

made "great efforts" to hide himself, as he was sleeping under several layers of cardboard. Due to the seriousness of the incident, the claimant was terminated.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer can reasonably expect that an employee will follow work rules and will not sleep on the job. An employer can also reasonably expect that an employee will not deliberately place himself in a position where serious injury or death could occur. The employer has the burden of proof to show misconduct.

In this case, the evidence established that the claimant deliberately chose to sleep on the job and went so far as to hide himself under several layers of cardboard to avoid detection. The claimant was sleeping on the dock where product could be loaded. The claimant's action could have led to his death or serious injury. The claimant did not participate in the hearing and the reasons for his actions are unknown. The claimant materially breached his duties to the employer by both sleeping on the job and placing himself in a dangerous and unsafe position. Misconduct has been established and benefits are denied.

The next issue is overpayment of benefits.

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.

This matter is remanded to the claims section for determination of the overpayment issue.

DECISION:

The representative's decision dated March 23, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. This matter is remanded to the claims section for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw