

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEREK G CHELSVIG
Claimant

APPEAL NO. 09A-UI-03718-NT

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

**“LUBRICATIONS OF DES MOINES #1 LTD
“JIFFY LUBE**
Employer

**OC: 02/01/09
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Benefit Overpayment

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated February 27, 2009, reference 01, that concluded the claimant was dismissed but misconduct had not been shown. A telephone hearing was initially scheduled for April 2, 2009. However, the matter had been postponed. An initial decision on the record was issued in error when it appeared that the employer did not participate on the date originally scheduled. A telephone conference hearing was conducted on April 14, 2009. The claimant participated personally. The employer participated by Amy Carlson, Director of Operations.

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 of the witnesses and having considered the evidence in the record, finds: The claimant was employed by Jiffy Lube from January 14, 2008 until September 24, 2008 when he was discharged from employment. The claimant held the position of full-time assistant manager and was paid by salary. Mr. Chelsvig worked under the supervision of the facility's general manager. The claimant was scheduled to work 8:00 a.m. to 6:00 p.m. Monday through Friday and 8:00 a.m. until 5:00 p.m. on Saturdays. A decision was made to terminate Mr. Chelsvig when he failed to open the company facility on September 25, 2008 although he had been scheduled to do so. Company policy requires assistant managers to directly contact the store manager or the company's district manager if they are unable to open a facility timely. The claimant had been warned in the past on numerous occasions regarding attendance and punctuality. The claimant's last warning had been issued on August 16, 2008. At that time the claimant had been tardy on numerous occasions and had failed to open the store timely on two occasions. Mr. Chelsvig had been provided the telephone number of both his manager and the district manager and was aware of his responsibility to provide notification to the employer if, for any reason, he was unable to

open the store at its 8:00 a.m. opening time. Based upon the repeated warnings that had been served on Mr. Chelsvig and the most recent violation, a decision was made to terminate the claimant from his employment.

It is the claimant's position that he was ill on the day in question and did not open the store that morning. Although provided the number of the company's district manager, the claimant did not retain the number nor call the manager. He was unable to reach the store's manager and took no further action.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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 evidence in the record establishes the claimant had been repeatedly warned for attendance violations which included repetitive tardiness. The claimant had been specifically warned after he failed to open the store on two separate occasions in a timely manner and was aware that his employment was in jeopardy if he continued to be tardy or failed to open the store promptly. The evidence established the claimant was aware of his responsibility to immediately contact the store's manager or the company's district manager if he were unable to open the store

timely. The claimant did not retain the district manager's number and, therefore, made no attempt to provide notification when he could not reach the store manager that morning.

The administrative law judge concludes that the claimant knew or should have known of his obligation to provide notification to company management if he were unable to open the facility. The claimant's failure showed a disregard for the employer's interests and standards of behavior and thus was disqualifying under the provisions of the Iowa Employment Security Law.

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.

DECISION:

The representative's decision dated February 27, 2009, reference 01, is reversed. Derek Chelsvig is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided that he is otherwise eligible. The issue of whether the claimant must repay the unemployment insurance benefits is remanded to the UIS Division for determination.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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