

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHERYL A SMITH
Claimant

APPEAL NO. 15A-UI-08001-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAC INC
Employer

OC: 06/14/15
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 1, 2015, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged for benefits, based on an Agency conclusion that the claimant was discharged on June 4, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on August 13, 2015. Claimant Cheryl Smith participated. Jill Kent represented the employer and presented additional testimony through Melinda Haley, and Marie Cain. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One through Five into evidence. The administrative law judge took official notice of the Agency's administrative record of the fact-finding interview.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: the employer is a social services agency that provides home and community base support services to adults and children with intellectual and physical disabilities. Cheryl Smith was employed by DAC, Inc., as a full-time Direct Support Professional from 2012 until June 4, 2015, when the employer discharged her from the employment for allegedly sleeping on the job. Ms. Smith had an unusual work schedule. One week she would work from 7:30 p.m. to 7:30 or 8:15 a.m. five days and the next week she would be off work. Ms. Smith performed her work duties in a home where four adult clients resided. Three of the clients were female and had rooms on the upper level of the home. The client was male and had a room on the lower level of the home. The male was known to be a sex offender. Ms. Smith did not receive scheduled breaks and was not allowed to sleep at any point during her overnight shift. Indeed, the employer had a zero-tolerance policy regarding sleeping at work.

On June 3, 2015, a Department of Human Services relayed to the employer a report from one of the clients that Ms. Smith had slept while at work. The employer summoned Ms. Smith to a

meeting to discuss the allegation. Ms. Smith conceded that she did at times dose off, but that she would set her alarm to go off at 15-minute intervals to make sure that she woke up if she did doze off. Ms. Smith did not intentionally go to sleep, but, rather, knew she was at risk of dozing during the overnight shift and set her alarm at 15-minute intervals as a precaution against falling asleep. The employer discharged Ms. Smith based on its zero-tolerance policy.

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether

the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The evidence in the record is insufficient to establish any instances wherein Ms. Smith intentionally went to sleep while performing her duties. Given the long and overnight work hours, one would expect the person working such hours in the particular context to be at risk of dozing. Rather than establishing misconduct on the part of Ms. Smith, the evidence establishes that Ms. Smith took reasonable measures in good faith as a precaution about remaining asleep in the event that she did unintentionally doze off.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Smith was discharged for no disqualifying reason. Accordingly, Ms. Smith is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The July 1, 2015, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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