

certified nursing assistant. The claimant received a copy of the employer's handbook and signed for its receipt on August 17, 2005. The handbook states that an employee who sleeps on the job should be terminated.

On August 28, 2005, the claimant had a migraine. She sat in a chair in the lobby with her eyes shut. When a call light came on she answered it and performed her work. The employer noticed the claimant's behavior and thought she was sleeping on the job. The employer did not talk to the claimant about her conduct.

On September 10, 2005, the claimant sat in her car for her 30-minute break. She fell asleep and returned to work after one hour. The claimant told the employer she had fallen asleep and wondered why no one came to get her. On September 15, 2005, the employer terminated the claimant for sleeping on the job.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Sleeping on the job on two occasions, one year apart, can constitute job misconduct. The grounds for discharge listed under a contract of hire are irrelevant to determination of eligibility for Job Service benefits in a misconduct situation. Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309 (Iowa 1986). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The employer has a rule which called for the termination of an employee who was found sleeping, but the employer admitted it did not follow its own rules on August 28, 2005. Not only did the employer fail to terminate the claimant or issue her a warning, the employer did not even mention the incident to the claimant. The claimant had never been warned about her conduct. From the claimant's viewpoint, she had one incident of misconduct for which she was terminated. The employer failed to offer any evidence of repeated misconduct after a warning had been issued. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's October 14, 2005 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/kjw