

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KENNETH L SALYER
Claimant

APPEAL NO. 09A-UI-19120-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE LINT COMPANIES
Employer

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

Section 96.5(2)a – Discharge for Misconduct
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

The Lint Companies filed an appeal from a representative's decision dated December 16, 2009, reference 02, which held that no disqualification would be imposed regarding Kenneth Salyer's separation from employment. After due notice was issued, a hearing was held by telephone on February 2, 2010. Mr. Salyer participated personally. The employer participated by Naren Coxe, Human Resources Director, and Vance Gehlbach, Manager of National Records Management.

ISSUE:

At issue in this matter is whether Mr. Salyer was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Salyer was employed by The Lint Companies from April 20 until November 18, 2009 as a full-time salesman. He was discharged for sleeping on the job.

Mr. Salyer's supervisor, Vance Gehlbach, spoke to him on September 10 regarding a report from a company driver that Mr. Salyer was observed sleeping in his car in a customer's parking lot on September 9. He told the supervisor that he sometimes stopped to rest during the day. He acknowledged during the hearing that he took a nap in his car for 15 to 20 minutes on September 9. He was verbally warned that sleeping on the job was unacceptable and could result in his discharge. On October 13, Mr. Gehlbach personally observed Mr. Salyer asleep at his desk. He was seated at his desk with his head down and remained in that position for 30 to 45 minutes. When questioned, he denied that he was sleeping. He acknowledged during the hearing that he had his head down and his eyes closed. He was verbally warned on October 13 that he would be fired if caught sleeping on the job again.

The decision to discharge was based on the fact that Mr. Salyer was again observed sleeping at work on November 18. Mr. Gehlbach came to his office and it appeared that he was asleep.

Mr. Gehlbach said “wake up, sleeping beauty” but got no response. He then slammed the door to Mr. Salyer’s office and reopened it but still got no response. He began talking to the receptionist and questioning whether something might be wrong with Mr. Salyer. Mr. Salyer then began stirring and mumbling. He indicated he had been deep in thought. He was discharged the same day.

Mr. Salyer filed an additional claim for job insurance benefits effective November 29, 2009. He has received a total of \$932.00 in benefits since filing the additional claim.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Salyer was discharged for sleeping on the job. It was not unreasonable for him to believe he was entitled to a lunch break and that he could do what he chose during that break. Therefore, sleeping in his car on September 9 was not an act of deliberate misconduct. However, the verbal warning he received on September 10 should have been sufficient to put him on notice that sleeping at work would not be tolerated.

The administrative law judge is satisfied that Mr. Salyer was, in fact, sleeping in his office on both October 13 and November 18. The administrative law judge is not inclined to believe he would not have been aware of Mr. Gehlbach’s presence in his office if he was not sleeping. Most telling was Mr. Salyer’s testimony that he was jarred out of his reverie on November 18 when Mr. Gehlbach said “wake up, sleeping beauty,” which he contended was said after the door was slammed. If he had not been sleeping, it would seem that having the door to his personal office slammed would have been sufficient to jar him.

Mr. Salyer contended that he was not sleeping on October 13 but that he had his head in his hand with his eyes closed. He knew from the verbal warning he received on that date that such a posture in the future might cause Mr. Gehlbach to think he was sleeping. One would have to wonder why he would adopt that same posture on November 18 if he was not sleeping. On the whole, the evidence is sufficient to establish that Mr. Salyer was sleeping on October 13 and November 18 while fully aware that such conduct could result in his discharge. His conduct constituted a substantial disregard of the standards he knew the employer expected of him and is, therefore, misconduct within the meaning of the law. As such, benefits are denied.

Mr. Salyer has received benefits since filing his additional claim. Based on the decision herein, the benefits received now constitute an overpayment. As a general rule, an overpayment of job insurance benefits must be repaid. Iowa Code section 96.3(7). If the overpayment results from the reversal of an award of benefits based on an individual’s separation from employment, it may be waived under certain circumstances. An overpayment will not be recovered from an individual if the employer did not participate in the fact-finding interview on which the award of benefits was based, provided there was no fraud or willful misrepresentation on the part of the individual. This matter shall be remanded to Claims to determine if benefits already received will have to be repaid.

DECISION:

The representative's decision dated December 16, 2009, reference 02, is hereby reversed. Mr. Salyer was discharged by The Lint Companies for misconduct in connection with his employment. Benefits are denied until he has worked in and been paid wages for insured work equal to ten times his weekly job insurance benefit amount, provided he is otherwise eligible. This matter is remanded to Claims to determine the amount of any overpayment and whether Mr. Salyer will be required to repay benefits.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw