

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANTHONY J WEIDNER
Claimant

APPEAL NO. 09A-UI-07478-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALEGENT HEALTH
Employer

OC: 04/12/09
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated May 8, 2009, reference 01, that held the claimant was discharged for no misconduct on April 16, 2009, and benefits are allowed.

A telephone hearing was scheduled and held on June 4, 2009. The claimant participated. Lynn Corbeil, representative; Craig Luze, director; and Rolley Newton, manager; and Nancy Welch, manager; participated on behalf of the employer. Employer Exhibits 1-9 were received as evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.
Whether the claimant is overpaid unemployment 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 worked as a full-time, senior biomedical technician from July 31, 1978 until April 16, 2009.

Claimant was discharged from employment on April 16, 2009, for sleeping on the job, violation of a company policy, after having received repeated warnings.

Claimant received disciplinary warnings for sleeping on the job on April 16, 2008; June 16, 2008; and a final warning on November 12, 2008. Claimant was put on notice during the final warning interview that a further incident of sleeping on the job would result in termination from employment.

During the progressive discipline, claimant was repeatedly challenged by management to seek medical help regarding his habitual sleeping problem. It is important to the employer that it has a professional relationship and one that maintains respect in working in a hospital environment. Claimant sleeping on the job had gotten to the point where it was causing a morale problem among its employees and he had become a joke in the hospital and discussed by its employees.

During a training class on April 8, 2009, claimant was observed by the instructor and attendees, repeatedly nodding off and closing his eyes with his chin on his chest. Manager Welch, who was a participant in the class who had an opportunity to observe the claimant's behavior, concluded that he was falling asleep for extended periods of time. Class Instructor Lancaster reported the claimant's conduct to Manager Newton, who consulted with Director Luze. Director Luze and Manager Newton conferenced with the claimant after reviewing evidence of the most recent sleeping incident on April 8, 2009, and advised the claimant on April 16 that he was being discharged from employment for repeated instances of sleeping on the job after having received progressive discipline.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes that the claimant was discharged for misconduct in connection with employment on April 16, 2009, for sleeping on the job in violation of company policy after having received progressive discipline.

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.

Sleeping on the job, on two occasions, one year apart, can constitute job misconduct. Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986).

The evidence establishes that the claimant knew and understood the policy of the employer regarding company policy for sleeping on the job and he acknowledged having received progressive discipline on this issue to the point of a final warning. The employer established that the claimant committed a current act of misconduct by sleeping on the job April 8, 2009, that resulted in his discharge on April 16. The employer challenged the claimant to seek medical consultation regarding what is readily apparent as a habitual sleeping on the job problem, and he refused to do so. Employer did not impose any unreasonable work requirements regarding the claimant's normal schedule that included some on-call work that would provide him with good cause for sleeping while on the job.

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.

Since the claimant has now been disqualified by reason of this decision, he may be subject to an overpayment of benefits and this issue is remanded to claims for determination.

DECISION:

The decision of the department representative dated May 8, 2009, reference 01, is reversed. The employer has established that the claimant was discharged for misconduct in connection with employment on April 16, 2009. The claimant is not entitled to receive benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The issue of the overpayment of benefits is remanded for determination.

R. L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

srs/pjs