

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHANA CALHOUN
Claimant

APPEAL NO: 10A-UI-03570-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERICAN HOME FINDING ASSN
Employer

OC: 02-07-10
Claimant: Appellant (2)

Section 96.5-2-a - Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 1, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 19, 2010. The claimant participated in the hearing. Tammy Loersell, Program Director/Site Supervisor and Tom Lazio, Executive Director, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time overnight youth counselor for American Home Finding Association from June 20, 2008 through January 21, 2010. She received a written warning on July 17, 2009 for sleeping on the job. The claimant fell asleep for approximately 20 minutes December 9, 2009 and received another warning December 14, 2009. When the employer counseled the claimant, she admitted having trouble staying away so the employer offered counseling at an outside agency and referred her to the Employee Assistance Program. The employer advised the claimant her employment was conditional upon her seeking assistance for her inability to stay awake but the employer never provided the claimant with a date by which it had to be completed. The employer followed up on January 14, 2010, and the claimant admitted she had not made an appointment or attended counseling yet. The employer terminated her employment for failure to complete counseling.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 claimant was discharged for failing to seek counseling. 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). While the claimant had not sought counseling as directed, the employer likewise had not given her a specific date by which it was to be done. The employer expected the claimant to follow through within a relatively short period of time considering it was the holiday season and the employer testified there were waiting lists for mental health treatment especially during that time of year. Although the claimant did fall asleep at work on at least two occasions, the termination was the result of her failure to attend counseling prior to her termination rather than the sleeping itself. The fact she did not attend treatment does not rise to the level of disqualifying misconduct as defined by Iowa law because there was no deadline set. Misconduct must be substantial in nature to support a disqualification from unemployment benefits. Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1982). The focus is on deliberate, intentional, or culpable acts by the employee. Id. The employer has not met its burden of proof. Therefore, benefits must be allowed.

DECISION:

The March 1, 2010, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs