

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARWA DOLLY
Claimant

APPEAL NO: 15A-UI-00738-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HEARTLAND EMPLOYMENT SERVICES
Employer

OC: 12/28/14
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 9, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on February 10, 2015. The claimant participated in the hearing. McKayla Schrofer, Human Resources Director; Christina Duncan, CNA; Della Woomer, LPN Nurse Supervisor; and Jeanie LaBrie, RN Nurse Supervisor; participated in the hearing on behalf of the employer.

ISSUE:

The issues are whether the employer discharged the claimant for work-connected misconduct and whether she is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time CNA for Heartland Employment Services from March 6, 2014 to December 29, 2014. She was discharged for sleeping on the job.

The claimant usually worked from 2:00 p.m. to 10:00 p.m. She picked up an overnight shift following her regular shift December 14/15, 2014. The other two CNAs and the nurses were having difficulty finding the claimant on the floor around 4:00 a.m. CNA Christina Duncan was walking down the hall with the only other CNA on that shift, besides the claimant, on the way to care for a patient. She was looking for the claimant on her way to the patient's room when she looked into a lounge called the Woodlands Room and saw the claimant lying on a sofa on her side with her face toward the back of the sofa. Ms. Duncan clapped her hands a few times from the door way to try to wake the claimant but she did not stir. Ms. Duncan notified her supervisor, LPN Nurse Supervisor Della Woomer, and then continued to the patient's room.

Ms. Woomer went to the Woodlands Room and also observed the claimant lying on the sofa on her side. Ms. Woomer walked up to the claimant and shook her gently and said her name before the claimant awoke and sat up and Ms. Woomer told her they needed her on the floor.

It was the employer's busiest time of day because employees are getting residents up and ready for the day. After the claimant sat up on the sofa Ms. Woomer left the room and notified the claimant's supervisor for the evening, RN Nurse Supervisor Jeanie LaBrie, that the claimant was found sleeping in the Woodlands Room. Ms. LaBrie went to the lounge and found the claimant sitting upright on the sofa with her chin on her chest and her eyes closed. Ms. LaBrie walked around the claimant, rustled some papers to see if she would respond, and then stood directly in front of the claimant but she did not respond to the noise or Ms. LaBrie's presence. Ms. LaBrie said the claimant's name a few times and she startled awake with her eyes wide open. Ms. LaBrie told the claimant she was needed on the floor and she needed to "get out there and start helping." The claimant got up at that time and returned to work.

On December 15, 2014 Ms. Woomer notified DON Rebecca Peterson about the situation and Ms. Peterson informed Human Resource Director McKayla Schrofer. The claimant was suspended pending investigation on that date. Ms. Schrofer began her investigation and instructed the three witnesses to write a statement the next time they each worked, with the last being completed December 19, 2014. Ms. Schrofer interviewed the claimant about the situation and had her write a written statement December 18, 2014. Ms. Schrofer was ill December 22 through 24, 2014 and then it was the Christmas holiday. The next date Ms. Schrofer worked was December 29, 2014. At that time Ms. Schrofer notified the claimant that her employment was terminated for sleeping on the job, a class A violation which results in immediate termination. The claimant received an employee handbook and signed for it March 6, 2014.

The claimant has claimed and received unemployment insurance benefits in the amount of \$2592.

The employer did not personally participate in the fact-finding interview but did submit documentation to the fact-finder. Neither the employer's representative nor a witness from the employer was available for rebuttal statements during the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code § 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 proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged him for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a. Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts of omissions that constitute a material breach of the worker's duties and obligations to the employer. See 871 IAC 24.32(1).

While the claimant denies sleeping on the job, the employer's witnesses' testimony was more persuasive than that of the claimant. Three witnesses, one CAN, and two nurse supervisors for the employer reported seeing the claimant sleeping. The witnesses were not together when they observed the claimant sleeping around 4:00 a.m., the employer's busiest time of the day. There were only a total of three CNAs to cover 60 patients at that time and the employer needed the claimant's help but could not locate her. Consequently, while walking to another patient's room, Ms. Duncan was also looking for the claimant and looked in each room as she passed it. She eventually noticed the claimant lying on the sofa in the Woodlands Room and clapped her hands a couple times but the claimant did not wake up. Ms. Duncan reported the situation to Ms. Woomer who went to talk to the claimant and also found her asleep on a sofa in the Woodlands Room. Ms. Woomer woke the claimant up and she sat upright, leaving Ms. Woomer with the impression she was getting up and returning to work. Ms. Woomer notified Ms. LaBrie who went to find the claimant and discovered she was still in the lounge, sitting up but still asleep. Her chin was on her chest and her eyes were closed. She did not stir until Ms. LaBrie said her name a few times. At that point the claimant woke up and returned to work.

The evidence establishes the claimant was sleeping on the job and was not on a break or lunch period when she fell asleep. As a CNA the claimant had a higher duty to stay awake and care for residents and be available to residents than employees in some other type of work.

The employer's policy reflects the importance of staying awake at work by classifying sleeping on the job as a class A violation that results in immediate termination. The claimant was aware of the policy.

Under these circumstances, the administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. In this case, the claimant has received benefits but was not eligible for those benefits. There is no evidence the claimant received benefits due to fraud or willful misrepresentation but the employer did not meet the definition of "participation" in the fact-finding interview. It did provide the name and telephone number of an employee with firsthand information who may be contacted. 871 IAC 24.10. When the fact-finder attempted to call the employer or its representative January 8, 2015 at 9:33 a.m. he did not get an answer but left a voice mail for the employer to call with a statement and left the employer's appeal rights. "The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal." 871 IAC 24.10(1). (Emphasis added). Additionally, "information submitted after the fact-finding decision has been issued is not considered participation within the meaning of the law." 871 IAC 24.10(1). The employer submitted its documentation the day after the fact-finding interview, including written statements and a copy of the policy violated, but did do so prior to the fact-finding interview. Consequently, because the employer did not meet the definition of participation as outlined above, the claimant's overpayment of benefits in the amount of \$2592 to date is waived as to the claimant and shall be charged to the employer's account.

DECISION:

The January 9, 2015, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. Because the employer did not meet the definition of participation, however, the claimant's overpayment of benefits in the amount of \$2592 to date is waived as to the claimant and shall be charged to the employer's account.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

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