

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM D PORTUGUE
Claimant

APPEAL NO. 10A-UI-03843-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OLYMPIC STEEL IOWA INC
Employer

**OC: 02/07/10
Claimant: Respondent (2R)**

Section 96.5-2-A – Misconduct
Section 96.3-7—Overpayment of Benefits

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated March 3, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 27, 2010. The hearing could not be completed at that time. The hearing was reconvened on May 5, 2010. The hearing could not be completed on that date as the claimant requested that some be witnesses be subpoenaed to testify. The hearing was recessed and then completed on June 8, 2010. Claimant participated. Employer participated by Melissa Schmidt, Human Resources Representative, and Kirk Pittman, Second Shift Production Manager. The claimant requested subpoenas for the following individuals to testify on his behalf: James Auliff; Kyle Brown; and Steve Phillips. The record consists of the testimony of Melissa Schmidt; the testimony of Kirk Pittman; the testimony of James Auliff; the testimony of Kyle Brown; the testimony of Steve Phillips; the testimony of William Portugue; Claimant's Exhibits A-D; and Employer's Exhibits 1-5.

ISSUES:

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a steel service center located in Bettendorf, Iowa. The claimant was initially hired on October 18, 2000. On the date of his termination, February 10, 2010, he was a quality technician.

The incident that led to the claimant's termination occurred on February 9, 2010. At 8:50 p.m., Kirk Pittman, second shift production manager, walked by the quality assurance office and observed the claimant sleeping. The quality assurance office has a large glass window.

Mr. Pittman saw the claimant with his chin on his chest and his eyes closed. Mr. Pittman went back to his office and then took his break. He returned to his office at 9:15 p.m. At 9:27 p.m. he went back to the quality assurance office and observed the claimant sleeping. Mr. Pittman yelled the name of another employee. The claimant then “jerked up” and was looked immediately startled.

Mr. Pittman then sent an email to his supervisor; the claimant’s supervisor; and human resources concerning his observations of the claimant. Melissa Schmidt, human resources representative, conducted an investigation. The claimant was informed on February 10, 2010, that he was being terminated for sleeping on the job.

The employer has a written policy that prohibits sleeping on the job and further states that sleeping on the job, even for a first offense, constitutes grounds for immediate termination. The claimant had been warned a few weeks earlier about sleeping on the job. An employee had videotaped the claimant on his camera phone while the claimant was sleeping on the job. Mr. Pittman personally reviewed the video as did Mr. Willis, who was the claimant’s supervisor. The employee who had taken the videotape did not want to get anyone in trouble and so the claimant was not terminated at that time. The claimant was aware of the employer’s policy concerning sleeping on the job.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer can reasonably expect that employees will not sleep on the job. The employer has the burden of proof to show misconduct.

The administrative law judge, after carefully reviewing all of the evidence and assessing the credibility of the witnesses, concludes that the employer has shown misconduct. Although the claimant denied that he was sleeping on the job, his testimony is not credible. The claimant asserted that Mr. Pittman was being untruthful in order to retaliate against the claimant because the claimant had complained about Mr. Pittman to human resources. Mr. Pittman testified that he thought he and the claimant had a good working relationship and he was unaware that the claimant had filed complaints against him. Ms. Schmidt corroborated Mr. Pittman's testimony by saying that the claimant's complaints against Mr. Pittman were so outrageous that the employer saw no merit in pursuing the matter. Mr. Pittman could hardly retaliate against the claimant as he was unaware that the claimant had made complaints about him.

The claimant also testified that he was not sleeping at 8:50 p.m. He said that he was working although he could not explain why his chin was on his chest and his eyes were closed other than to say he was concentrating on a spreadsheet. He denied being in the office at 8:27 p.m. but Mr. Pittman testified that he saw the claimant and not another employee. The claimant's cell phone records were examined and all those records indicate is that the claimant received a text message at 9:21p.m. and 9:27 p.m. Nothing in these records show that claimant was on the phone or texting when he was observed sleeping. None of the witnesses subpoenaed by the claimant could testify what the claimant was doing on February 9, 2010.

The claimant knew that his employer prohibited sleeping on the job. A few weeks prior to the claimant's termination, the claimant was warned against sleeping on the job after a co-employee had taped the claimant sleeping with a camera phone. The claimant deliberately chose to violate his employer's policy against sleeping on the job. Misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated March 3, 2010, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. This matter is remanded to the Claims Section for determination of the overpayment issue.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css