

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

WILLIAM ROBINSON
2705 ADAMS
DES MOINES IA 50310

PEPSI-COLA GENERAL BOTTLERS INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-01225-RT
OC: 12-18-05 R: 02
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, William Robinson, filed a timely appeal from an unemployment insurance decision dated January 23, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on February 16, 2006, with the claimant participating. Shawn Powers, Human Resources Generalist, and Dave Bramow, Production Manager, participated in the hearing for the employer, Pepsi-Cola General Bottlers, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time machine operator from July 1, 1996 until he was discharged on November 28, 2005. The claimant was discharged for sleeping on the job. On November 23, 2005, the employer's witness, Dave Bramow, Production Manager, was informed by a production supervisor that the claimant was sleeping in his position at work. Mr. Bramow accompanied the production supervisor and a union steward over to the claimant's location. The claimant was sitting down on a stack of shelves with his chin on his chest and his head down and his eyes closed. Mr. Bramow spoke to the claimant but the claimant had no response. Mr. Bramow walked up to the claimant two feet away and again spoke the claimant's name without a response. Mr. Bramow then, much louder with a raised voice, spoke to the claimant, and the claimant woke up and raised his head. Mr. Bramow told the claimant that he was sleeping on the job and that it was a violation of the employer's policy. The claimant nodded his head up and down. Just a few days before November 23, 2005, the claimant received a verbal warning on November 19, 2005, from his production supervisor for sleeping on the job. The claimant was sleeping on the job at that time. This production supervisor informed the claimant that he needed to be more careful and that the claimant should find other means to stay awake, such as walking around. The employer has a policy in its general rules of conduct prohibiting sleeping on the job. These rules of conduct are included in the employee's handbook, a copy of which the claimant received and for which he signed an acknowledgment. Although the claimant was not specifically aware that the policies prohibited sleeping on the job, the claimant was aware that it was not acceptable behavior. The claimant has sleep apnea but was not able to see a physician until January 3 of 2006. The claimant did not mention any sleep apnea condition or other medical condition causing a sleeping problem at any time before his discharge or even at the claimant's grievance hearing on December 13, 2005. In addition to warnings for absenteeism, the claimant was on a second chance agreement arising in July of 2005. The claimant fulfilled the terms of that agreement.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on November 28, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, sleeping on the job. The employer's witness, Shawn Powers, Human Resources Generalist, credibly testified that the employer has a rule in its general rules of conduct contained in its handbook prohibiting sleeping on the job. Ms. Powers further testified credibly that the claimant received a copy of the handbook and further signed an acknowledgment. The claimant concedes that he received the handbook and, although the claimant testified he was not aware specifically that sleeping was prohibited, he was aware that it was not acceptable behavior.

The employer's witness, Dave Bramow, Production Manager, credibly testified that he had personally observed the claimant asleep on November 23, 2005, while at his position or station at work. Mr. Bramow credibly testified that the claimant's chin was on his chest, his head was down, and his eyes were closed. Mr. Bramow further credibly testified that he spoke to the claimant twice, once only two feet away, but the claimant did not respond. Mr. Bramow then spoke much louder to the claimant a third time, and the claimant woke up and nodded his head when Mr. Bramow told the claimant that he was sleeping on the job and that this was a violation of the employer's policy. This incident occurred just four days after the claimant had been given a verbal warning from his production supervisor for sleeping on the job. The claimant was sleeping on the job on that occasion and was warned by his production supervisor to be more careful and that he should find some means of staying awake such as walking around. Although the claimant denied that his supervisor told him that it was grounds for termination, the administrative law judge must conclude that the supervisor must have said something to the claimant about sleeping being prohibited.

The claimant credibly testified that on January 3, 2006, when he saw a physician, he was diagnosed as having sleep apnea, which was causing him to get little sleep at night and therefore causing him to fall asleep during the day time. The claimant testified that he attempted to get a doctor's appointment after the warning on November 19, 2005, but could not get in to see a physician until January 3, 2006. Because of the claimant's long employment

with the employer and his testimony about the sleep apnea, the administrative law judge is constrained to conclude here that the claimant's sleeping on the job was neither deliberate nor willful and that therefore his sleeping on the job was not a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment, nor does it evince a willful or wanton disregard of the employer's interests and therefore is not disqualifying misconduct for those reasons. However, the administrative law judge is constrained to conclude on the record here that the claimant's sleeping on the job was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant was warned just four days before he was caught sleeping on the job on November 23, 2005, which resulted in his discharge. The claimant was on notice that sleeping on the job was prohibited and that he should carefully avoid that, but the claimant did not and was caught sleeping four days after the warning. There is evidence that the claimant had been placed on a second chance agreement in July of 2004. Although the reasons for that second chance agreement are not necessarily relevant here, the fact that the claimant was on a second chance agreement does indicate that the claimant was aware that he needed to conduct himself appropriately. Consequently, on the record here, the administrative law judge is constrained to conclude that the claimant's sleeping on the job was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge notes that the claimant conceded that he slept on the job both for the verbal warning on November 19, 2005 and on November 23, 2005, when he was discharged. The claimant also knew, at the very least, that it was not acceptable behavior. The administrative law judge is not without sympathy for the claimant but must conclude here that the claimant should have done much more and much sooner to prevent his sleeping on the job. When he was warned, he was told to get up and walk around, and the claimant should have done that or something else, but he did not, and his failure to do so is carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

DECISION:

The representative's decision of January 23, 2006, reference 01, is affirmed. The claimant, William Robinson, is not entitled to receive unemployment insurance benefits until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct.

kkf/kjw