

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LELANI WILSON
Claimant

APPEAL NO: 09A-UI-14796-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ADP INC
Employer

OC: 08/30/09
Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

ADP, Inc. (employer) appealed an unemployment insurance decision dated September 23, 2009, reference 01, which held that Lelani Wilson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 30, 2009. The claimant participated in the hearing. The employer participated through Lacey Schmidt, Tammy Morris, Kathy Binns and Employer Representative Joseph Ojeda. Employer's Exhibits One and Two were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time client service representative from October 17, 2005 through September 2, 2009. She was discharged per the employer's progressive disciplinary policy. The employer issued the claimant a verbal warning on April 16, 2009 for unsatisfactory performance. A written warning was issued on May 20, 2009 for failure to meet the employer's standard for call times. She was maintaining an average adherence rate of 91 percent and was required to be at or above 93 percent.

The claimant's final written warning was issued on August 19, 2009. Her average handle time for each call was to be at eight minutes or less and the claimant's June average handle time was 8:49. She was over 12 minutes for the last three months of 2008 and had reduced the call time to a little over ten minutes for the first five months of 2009, so there had been improvements. The employer observed the claimant at her desk with her eyes closed on five occasions and documented that the claimant appeared to be sleeping. The claimant denies sleeping and stated that if she was sleeping, there would be no question about it since she snores loudly.

The employer discharged the claimant on September 2, 2009 for putting two calls on hold longer than three minutes, for failure to document two calls properly and for having her eyes shut while at her desk. The employer documented that the claimant put a call on hold over the three minute requirement on August 24, 2009 and August 25, 2009. The employer was unable to provide any detailed evidence as to how long the calls were put on hold. The claimant said she may have put the calls on hold longer than three minutes if it took her longer to find the right answers. The employer testified the claimant failed to document two calls properly but could provide no details as to when the calls were made and what exactly was missing from the documentation.

The final incident that prompted the discharge was that the claimant's supervisor saw the claimant's eyes were shut on September 1, 2009. She said the claimant's head was nodding. The supervisor stood behind the claimant for three minutes and the claimant did not acknowledge her. The employer representative asked the claimant why she did not react when the supervisor was standing there for three minutes. The claimant explained that she could not see the supervisor since she was standing behind her, but just assumed that the supervisor was talking to other employees. The claimant denies sleeping on September 1, 2009 and any other dates. She does have some medical problems for which she takes medication and the bright lights bother her eyes.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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 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). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer was unable to provide detailed evidence as to the final incidents that prompted the termination, except for the allegation that the claimant was sleeping, which she denied. 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 evidence provided by the claimant does not rise to the level of job misconduct as that term is defined in the above stated Administrative Rule. The employer failed to meet its burden. Work-connected misconduct has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated September 23, 2009, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css