

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JACOB J BUDDE

Claimant

APPEAL 16A-UI-09865-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GEORGIA PACIFIC CORRUGATED LLC

Employer

OC: 08/14/16

Claimant: Respondent (1)

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

Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the August 29, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 27, 2016. Claimant participated. Mark Cook testified on behalf of claimant. Employer participated through hearing representative Tanis Burrell, human resources manager Danielle Bright, first shift supervisor Greg Sill, and third shift supervisor Tim Wunder. First shift supervisor Dan Bean attended the hearing on behalf of the employer.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a roll clamp driver from June 18, 2013, and was separated from employment on August 12, 2016, when he was discharged.

The employer has written work rules. Work rule number 8 prohibits sleeping while on duty. Violation of work rule number 8 is a major violation. Major violations may result in immediate termination. Claimant was aware of the work rules.

On August 4, 2016, claimant was working his regularly scheduled shift. Claimant was discovered by Mr. Sill sleeping on mobile equipment in the back of the sheet warehouse. Claimant was also observed sleeping by Mr. Bean and Mr. Wunder. In the course of claimant's

regular duties, he would go to the sheet warehouse to move product depending on need. On August 4, 2016, Mr. Sill was looking for claimant because he was needed for work in another area and the employer could not reach claimant on the radio. After Mr. Sill, Mr. Bean, and Mr. Wunder observed claimant sleeping, Mr. Sill woke claimant up and asked him to go to the supervisor's office. Claimant did not say anything after he was woken up. Claimant went to the office. The employer suspended (unpaid) claimant indefinitely pending their investigation. Ms. Bright conducted the employer's investigation.

On August 5, 2016, Ms. Bright spoke with claimant on the phone about the incident on August 4, 2016. Claimant indicated he was not feeling well and thought he had a migraine starting. Claimant stated he was going to shut his eyes for a bit and went to the back of the sheet warehouse. Claimant did not report his illness to his supervisor or the employer on August 4, 2016. Ms. Bright interviewed other individuals and supervisors. Claimant was discharged on August 12, 2016.

Claimant did not have any prior disciplinary warnings for sleeping. Claimant had a prior documented verbal warning in 2014 for attendance issues. Prior to August 4, 2016, another employee had been caught sleeping and the employer only suspended that employee.

REASONING AND CONCLUSIONS OF LAW:

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

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 proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. 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." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The Iowa Supreme Court has found sleeping on the job on two occasions, one year apart, can constitute job misconduct. *Hurtado v. Iowa Dep't of Job Serv.*, 393 N.W.2d 309 (Iowa 1986). The administrative law judge does find claimant was sleeping on August 4, 2016. However, unlike in *Hurtado*, this employer only found claimant sleeping on the job on one occasion. Furthermore, the employer did not find claimant sleeping in some hidden or secretive area, but instead found him in an area he would normally be at during his work day. Claimant also credibly testified that the reason he closed his eyes is because he felt a migraine was starting. Although claimant should have notified the employer he was starting to get a migraine and was going to close his eyes, he did not have any prior disciplinary warnings for sleeping. It is also noted that claimant's only prior disciplinary warning was for attendance issues in 2014.

The conduct for which claimant was discharged was merely an isolated incident of poor judgment and inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an

employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Benefits are allowed.

Furthermore, even though claimant was sleeping, since the consequence (discharge) was more severe than another employee received (suspension) for similar conduct, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The August 29, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/pjs

NOTE TO EMPLOYER:

If you wish to change the address of record, please access your account at:
<https://www.myiowauui.org/UITIPTaxWeb/>.

Helpful information about using this site may be found at:

<http://www.iowaworkforce.org/ui/uiemployers.htm> and
http://www.youtube.com/watch?v=_mpCM8FGQoY