

**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**

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**Appeal Number: 04A-UI-03379-BT  
OC: 02/29/04 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Johnetta Levell (claimant) appealed an unemployment insurance decision dated March 24, 2004, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Mercy Hospital (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 7, 2004. The claimant participated in the hearing with Legal Assistant Teresa Jones. The employer participated through Supervisor Leanna Brady, Employee Relations Manager Kevin Elsberry and Attorney Patricia Shoff. Employer's Exhibits One and Two were admitted into evidence.

#### 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 resident counselor from November 7, 2001 through March 3, 2004. The claimant worked the night shift caring for clients who have been court ordered to care. Sometimes these clients have small children staying with them. The claimant was discharged for repeatedly sleeping on the job and neglecting her duties. The claimant received her first written warning on July 25, 2002. A co-employee saw the claimant sleeping on July 23, 2002. The claimant heard the co-employee and woke up. This particular co-employee reported the information to the employer and also advised that she had caught the claimant sleeping on two previous occasions. She knocked on the window once to wake up the claimant and the other time, the claimant had a book propped in front of her as if she was reading, but was instead sleeping. The claimant is the only staff member on her shift and it is crucial that she be awake and alert at all times for the safety and security of the clients. Failure of the employer to provide constant care and supervision could result in the loss of their operating license. A second written warning was issued to the claimant on July 1, 2003, in which she was suspended for sleeping during her shift. Two clients reported the information to the employer but the claimant denied the allegations. The employer investigated further and discovered many more clients confirmed the claimant sleeps during her shift. The final incidents were reported to the employer on February 16, 2004. Three clients reported that they found the claimant sleeping during her overnight shift. The dates she was sleeping are approximately January 4, 2004 and February 6, 2004. It was also reported the claimant was missing from the facility when a client was looking for her. The client even called the security guard who was unaware of the claimant's location. The delay in reporting the information to the employer was possibly due to the fact that the clients are young and perhaps insecure considering the environment in which they were placed. The employer conducted an investigation and while the claimant denied sleeping, she did admit to leaving the area to go out to her car. The claimant contends she spoke with the security officer about this, but the security guard knew nothing about the claimant leaving the facility at any time. The claimant was discharged on March 3, 2004.

#### 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 Section 96.5-2-a.

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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant was discharged for sleeping on the job and neglecting patient care. She knew her job was in jeopardy as she had already received two warnings about sleeping on the job. Sleeping on the job on two occasions, one year apart, can constitute job misconduct. Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309 (Iowa 1986). The claimant denies the fact that she was sleeping but the evidence confirms a pattern of the claimant sleeping during her shift. Furthermore, the claimant admitted she left the facility when she was working, but claims she advised the security officer. The security officer had no such knowledge but even if he did, the claimant should not have left the facility for any personal reasons at any time. Her actions were detrimental to the employer's interests and were a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated March 24, 2004, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount provided she is otherwise eligible.

sdb/kjf