

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

EMMA WESLEY
2338 S BENJAMIN AVE
MASON CITY IA 50401

USA HEALTHCARE – MASON CITY
C/o THOMAS & THORNGREN INC
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NASHVILLE TN 37228

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Appeal Number: 05A-UI-01252-CT
OC: 01/02/05 R: 02
Claimant: Respondent (2)

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
Section 96.3(7) – Recovery of Overpayments

STATEMENT OF THE CASE:

USA Healthcare filed an appeal from a representative's decision dated January 25, 2005, reference 01, which held that no disqualification would be imposed regarding Emma Wesley's separation from employment. After due notice was issued, a hearing was held by telephone on February 21, 2005. Ms. Wesley participated personally and was represented by Evelyn Ocheltree, Attorney at Law. The employer participated by Shanna Litterer, Administrator; Michelle Lawson, Director of Nursing; and Lonny Halama, Housekeeping/Laundry.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Wesley was employed by USA Healthcare from October 4, 2002 until December 28, 2004 as a full-time certified nursing assistant. She was discharged after two coworkers reported that she was sleeping on the job on December 24. Ms. Wesley's usual shift was from 10:00 p.m. on one day until 6:00 a.m. the following day.

At approximately 4:30 a.m. on December 24, a nurse was in the room with a resident when Lonny Halama from housekeeping entered. Ms. Halama noted that Ms. Wesley was in the resident's recliner and was asleep. She pointed this fact out to the nurse who indicated that she had noted the same thing. Ms. Wesley had not had any conflicts with either Ms. Halama or the nurse. The incident was reported to management and Ms. Wesley was suspended pending a further investigation. She was notified of her discharge on December 28, 2004.

There had been a prior allegation on November 9 that Ms. Wesley was sleeping on the job on November 2. She denied the allegation and no disciplinary action was taken as it was a matter of her word against the other employee's. Ms. Wesley was, however, cautioned about sleeping on the job. Her conduct of December 24 was the sole reason for the discharge.

Ms. Wesley has received a total of \$1,484.00 in job insurance benefits since filing her claim effective January 2, 2005.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Wesley was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Wesley was discharged for sleeping on the job. Two individuals confirmed to management that she had been sleeping in a recliner in a resident's room on December 24. Ms. Wesley had not had any conflicts with the two individuals who reported her. Given the lack of prior conflicts, there is no basis on which to conclude or infer that the two would fabricate their statements to the employer.

Ms. Wesley's job was to be alert to the needs of the residents in her care. If she is sleeping during work time, she cannot perform the duties for which she was hired. Sleeping while on duty in a care facility constitutes a substantial disregard of the standards the employer had the right to expect. Although Ms. Wesley may not have been sleeping on the occasion in November, her conversation with the employer at that time clearly put her on notice that such conduct would not be tolerated by the employer. For the reasons stated herein, the administrative law judge concludes that disqualifying misconduct has been established by the evidence. Accordingly, benefits are denied.

Ms. Wesley has received benefits since filing her claim. Based on the decision herein, the benefits received now constitute an overpayment and must be repaid. Iowa Code section 96.3(7).

DECISION:

The representative's decision dated January 25, 2005, reference 01, is hereby reversed. Ms. Wesley was discharged for misconduct in connection with her employment. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly job insurance benefit amount, provided she satisfies all other conditions of eligibility. Ms. Wesley has been overpaid \$1,484.00 in job insurance benefits.

cfc/kjf