

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRUCE SMITH
Claimant

APPEAL NO. 06A-UI-11415-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARSCO CORP
Employer

**OC: 10-22-06 R: 04
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 20, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 13, 2006. The claimant participated in the hearing. Jeff Robertson, Production Foreman, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time overhead crane operator for Harsco Corporation from July 26, 2001 to October 24, 2006. Employees work 7:00 a.m. to 7:00 p.m. for two weeks and then work 7:00 p.m. to 7:00 a.m. for two weeks. The claimant was working the night shift October 10, 2006. At 2:00 a.m. the locomotive operator and the crane operator tried to call the claimant but did not receive any response. Production Foreman Jeff Robertson went to the claimant's worksite and tried to get his attention by yelling and slamming the gate before climbing into the cab from overhead to observe him sleeping. He yelled his name and hit the siren before finally shaking the claimant to wake him up. The employer suspended the claimant and then terminated his employment October 24, 2006, for violating its policy regarding sleeping on the job. This was the claimant's only incident of sleeping, and he testified he told the employer two days earlier he had an upper bronchial infection and asthma and only had three hours of sleep during the past two days. He had already used his time off for that three-month period and could not take time off without exceeding the allowed number of attendance points. He admits he was sleeping but stated he did not do so intentionally and did not mean to cause any harm.

REASONING AND CONCLUSIONS OF LAW:

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

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.

The employer has the burden of proving disqualifying misconduct. 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). While the claimant did fall asleep at work, he did notify the employer he was ill and had not had much sleep in the past two days. Because this was an isolated incident of misconduct, the administrative law judge concludes the claimant's actions do not rise to the level of disqualifying job misconduct as defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The November 20, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/kjw