

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHRISTIAN NZOMBO
Claimant

APPEAL NO: 11A-UI-02949-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SYSTEMS UNLIMITED INC
Employer

OC: 01-16-11
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 1, 2011, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 1, 2011. The claimant participated in the hearing. Jenny O'Brien, Human Resources Specialist, 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 part-time counselor for Systems Unlimited from June 17, 2010 to January 19, 2011. He was discharged because the employer believed he was sleeping on the job. On December 31, 2010, Troy, the maintenance man the employer contracts with, was at the house where the claimant was working around 8:00 a.m. The claimant greeted him when he first arrived and after the claimant told Troy where the maintenance problem was Troy left to get parts and tools. Troy returned around 10:00 a.m. and the claimant let him in and he began working on the project. The claimant walked to the front room and laid down on the sofa. He was not allowed to watch television unless one of the consumers came out in the common area and asked to watch television so the claimant laid on the couch with his head turned toward the back for 30 to 45 minutes. Whenever Troy entered or exited the house an alarm would sound because the residents were not allowed to leave the house without supervision as they required a high degree of guardianship so they did not injure themselves or others. The claimant did not get up to see who was coming and going but could see the kitchen door from the sofa and knew it was Troy. One of the consumers came out of his room and went to the refrigerator and returned to his room. The consumers stayed in their rooms the remainder of the time. Troy concluded the claimant was sleeping on the job and contacted Human Resources later that day. The employer met with the claimant January 5, 2011, and notified him of the allegations. It removed him from the schedule that day and informed him that his employment was terminated January 19, 2011.

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 § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 may well have been sleeping on the job December 31, 2010, and it is at the very least odd that he

would lie on the sofa for 30 to 45 minutes with his head facing the back of the couch and not be asleep, he denies sleeping and the employer's witness did not have any first-hand knowledge of the incident but rather relied on what Troy told the human resources manager and the staff supervisor and what they told her. Although hearsay evidence is allowed in administrative hearings, double hearsay will not usually suffice to overcome a witness' first hand testimony. Additionally, the employer was aware of this incident December 31, 2010, but waited 19 days to terminate the claimant's employment. That calls into question whether the claimant's actions were a current act of misconduct. Consequently, the administrative law judge concludes the employer has not established that the claimant was sleeping on the job December 31, 2010, or that this was a current act of misconduct as defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The March 1, 2011, reference 02, 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/pjs