

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID N PHILPOT
Claimant

APPEAL NO. 11A-UI-06532-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**IOWA DEPARTMENT OF ADMINISTRATIVE
SERVICES**
Employer

**OC: 04-10-11
Claimant: Respondent (2R)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 6, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 14, 2011. The claimant did participate. The employer did participate through Bonita Lane, Public Service Executive and Marsha Small, Custodial Supervisor and was represented by Jamie Cooper attorney at Law. Employer's Exhibits One through Four were entered and received into the record.

ISSUES:

Was the claimant discharged due to job related misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a custodian full time beginning November 15, 2010 through April 14, 2011 when he was discharged. On April 11, 2010 the claimant was to take his break from 8:00 a.m. to 8:15 a.m. If the claimant was going to take his break at a time other than the regular time he was to call his supervisor Marsha Small and get permission to take his break at a different time. He did not do so on April 11. The claimant's coworker Lavita told Ms. Small that the claimant went down to the break room on April 11 prior to 8:00 a.m. Ms. Small found the claimant sleeping in the break room at 8:27 a.m. She woke him up and he returned to work. He offered no explanation as to why he was sleeping when it was not his break time.

At 11:27 a.m. Ms. Small returned to the building where the claimant was working. She found him sleeping in the break room with his coat over him. She called Tim Ryburn and Ms. Lane. They both arrived at 11:41 a.m. and observed the claimant sleeping in the break room. The claimant's lunch period was from 11:00 a.m. until 11:30 a.m. Mr. Ryburn and Ms. Lane woke the claimant up at 11:45 a.m. and sent him home. He was discharged on April 14 for sleeping on the job and for repeated violations of the attendance policy, including eleven incidents of

tardiness and leaving early. The claimant never called his supervisor when he was going to be late to work.

The claimant has received unemployment benefits after the separation on a claim with an effective date of April 10, 2011.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). Sleeping on the job on two occasions, one year apart, can constitute job misconduct. *Hurtado v IDJS*, 393 N.W.2d 309 (Iowa 1986). The claimant knew he was not allowed to sleep while on the clock but did so anyway. The administrative law judge is not persuaded that the claimant was taking a late break on the morning of April 11. He was simply sleeping past his break time when Ms. Small found him. Additionally, the claimant was sleeping past his lunch break on April 11. Claimant's repeated failure to adequately and fully perform his job duties after having established the ability to do so is evidence of willful job related misconduct. Benefits are denied.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3(7). In this case, the claimant has received benefits but was not eligible for those benefits.

DECISION:

The May 6, 2011 (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

REMAND:

The matter of determining the amount of the potential overpayment and whether the overpayment should be recovered under Iowa Code § 96.3(7)b is remanded to the Agency.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs