**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**COREY M DVORAK**
Claimant

**THE HON COMPANY**
Employer

**APPEAL NO: 18R-UI-06925-TN-T**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 04/01/18**
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The Hon Company, the employer, filed a timely appeal from the April 30, 2018, reference 02, unemployment insurance decision that held Corey M. Dvorak eligible to receive unemployment insurance benefits, finding that the claimant was dismissed from work on April 4, 2018 but the record did not show willful or deliberate misconduct. A telephone hearing was scheduled for and held on May 31, 2018. The employer participated. The claimant did not participate. On June 5, 2018, an administrative law judge decision was entered reversing the adjudicated determination and finding that the claimant had been overpaid unemployment insurance benefits in the amount of $3,213.00. The claimant, Corey M. Dvorak, filed an appeal with the Employment Appeal Board on June 25, 2018. The Employment Appeal Board remanded the matter to the Iowa Workforce Development Appeals Bureau to conduct another hearing and to issue an appealable decision. The previous administrative law judge decision dated June 5, 2018 was not vacated and remained in force until a different determination was made pursuant to the remand.

In compliance with the Employment Appeal Board directives, a hearing was scheduled for and held on July 12, 2018 at which time the claimant participated. The employer participated by Ms. Pamela Drake, Hearing Representative, The Employer's Edge, LLC; and Ms. Kelli Raney, Employment Relations Manager. Employer's Exhibits 3, 8 and 9 were received into the hearing record without objection. The employer's proposed Exhibit, a video depiction of the claimant sleeping, was not admitted into the hearing record as an Exhibit, based upon the claimant's objection that he had not received a copy. The employer's witness provided testimony about what she had observed in the video depiction. The administrative law judge took official notice of the claimant's administrative file.

**ISSUE:**

The issue is whether the claimant was discharged for intentional job related misconduct sufficient to warrant the denial of job insurance benefits?
Has the claimant been overpaid unemployment benefits, and if so can the repayment of those benefits to the agency be waived?
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed by the Hon Company from July 31, 2017 until April 4, 2018, when he was discharged. On April 3, 2018, a company employee contacted the claimant's supervisor to report that he saw the claimant sleeping in the wet paint room. Group leader Samba Fall went to the paint booth and found the claimant, who appeared to be sleeping with a cell phone in his hand. Mr. Fall recorded an approximate 20 second video of the claimant via cell phone. Mr. Fall then woke up the claimant and work resumed.

The group leader reported the incident to management and provided a copy of the cell phone recording. Kelli Raney investigated the matter, viewed the recording, and spoke with Mr. Dvorak about the incident. Mr. Dvorak initially denied sleeping, asserting that he was "spacing off" with his cell phone while waiting for parts to arrive "to paint." Ms. Raney then played the video recording that had been taken by Mr. Fall, and the claimant then agreed that it appeared he had not been awake and alert.

Mr. Dvorak further explained that he had requested the day off from his supervisor but his supervisor had not granted him permission to miss work. Mr. Dvorak had been notified on April 3, 2018 of a serious medical condition, and was scheduled for two doctor's appointments on April 3, 2018, one at 8:00 a.m. and one in the afternoon. Because Mr. Dvorak began work at 3:00 p.m., he anticipated he would be fatigued from the medical appointments and procedures and therefore had requested the time off. Because he had not made his request until the night before, and because others were to be away from work, his request to be off on April 3, 2018 was denied. Mr. Dvorak was aware that he could still "call off" work on April 3, 2018.

Mr. Dvorak was also aware that he had only one remaining infraction point available to him under the company's "no-fault" attendance policy, and he would be discharged if he had to be absent again before he regained points under the system. Mr. Dvorak reported to work on April 3, 2018 because his supervisor had told him that he was "really needed." Mr. Dvorak testified that it was his general belief that he would be tired, but would be able to perform his duties when he reported for work that afternoon.

After considering the matter, The Hon Company concluded that the claimant had been sleeping on the job and also concluded that Mr. Dvorak had also intentionally violated an important safety rule by having a cell phone in his possession while performing his duties in the employer's facility on April 3, 2018. Because both sleeping on the job and willful safety violations are considered to be serious infractions of company policy, a decision was made to terminate Mr. Dvorak from his employment.

Mr. Dvorak asserts that he was not sleeping on the job and he had made no admissions to sleeping on the job. It is the claimant's position that he was more in a state of non-attention as he scrolled through his cell phone during a long period of no-production in the paint area. Production runs in the paint area is at times intermittent and paint booth employees are not required to perform any specific tasks in production. Mr. Dvorak asserts that the company rule which prohibits the possession of or use of cell phones by employees during working hours on company premises lacks enforcement, and paint booth employees and other workers routinely carry and use cell phones throughout the facility. Mr. Dvorak also asserts that a previous management person, "Jennifer," had also given him specific authorization to use his cell phone in a portion of the spray booth area. (Mr. Dvorak did not assert any specific permission when he was being questioned during the investigation, however.)

It appears that Mr. Dvorak had received two previous warnings for work quality; however, the claimant did not have prior warnings for sleeping on the job or use of or possession of a cell phone.

**REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional work related misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Misconduct must be substantial in nature to support the disqualification from unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. The employer has the burden of proving that the claimant was disqualified for benefits because of job-related misconduct. *Sallis v. Employment Appeal Board*, 437 N.W.2d 895, 896 (Iowa 1989). The issue is not whether the employer made a correct decision in separating the claimant from work but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of*

*Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability.

In the case at hand, the evidence establishes that Mr. Dvorak did fall asleep in his work area on the evening of April 3, 2018. The evidence also establishes that the claimant's act of sleeping on the job was not intentional, but caused in part by extenuating circumstances. The claimant had been informed the previous day of a serious medical problem and had a lack of sleep because two medical appointments were unexpectantly scheduled for him for April 3, 2018. Mr. Dvorak had requested the day off for these reasons as he anticipated that the medical issues may have an exhausting effect on him. Mr. Dvorak did not have his supervisor's permission to be absent because of the lateness of his request and because of staffing considerations. The claimant had only the choice of jeopardizing his continued employment by calling off work and accumulating an additional attendance infraction point which would put him at the point of discharge if he had one more absence for any reason. Mr. Dvorak chose to report to work for that reason, and also because his supervisor had repeatedly stated that "he "needed" Mr. Dvorak to report to work that night. The claimant made a wise decision in reporting to work to validate his supervisor's request to minimize the chances of being discharged for accumulating one more attendance infraction point.

Mr. Dvorak did not intend to sleep on the job while waiting for additional work in the paint booth area. He did not create a sleeping area or attempt to hide his conduct from others. He was fatigued and inadvertently dozed off during a period of down time while he waited for more work. The claimant did not attempt to hide the fact that he was scrolling through his cell phone during the down period. The company did not enforce the cell phone policy. Numerous other workers routinely possessed and used cell phones in the facility, with the knowledge of management, without being reprimanded or discharged. Mr. Dvorak had not been previously warned by the company about sleeping on the job or the use of a cell phone, and he did not know that his job was in jeopardy.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Mr. Dvorak for this reason, but whether the discharge is disqualifying under the provisions of the Iowa Employment Security law. While the decision to terminate Mr. Dvorak may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the evidence does not establish intentional work connected misconduct sufficient to warrant the denial of unemployment insurance benefits. If an employee is to face discharge for violation of a policy that has not recently been enforced, reasonable, detailed and preferably written warnings or notice should be given. Benefits are allowed, provided the claimant is otherwise eligible.

The claimant did not know he was placing his job in jeopardy by scrolling through his cell phone, as the use of cell phone was common with numerous other employees and the company was not enforcing the rule against cell phone use.

**DECISION:**

The representative's unemployment insurance decision dated April 30, 2018, reference 02, is affirmed. Claimant was dismissed from work on April 4, 2018 under non-disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terry P. Nice
Administrative Law Judge

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Decision Dated and Mailed

tn/scn