

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

**SOUKHA T PHOMMACHACK**  
Claimant

**ANDERSON-ERICKSON DAIRY CO**  
Employer

**APPEAL NO. 18A-UI-09443-B2**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/19/18  
Claimant: Appellant (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated September 7, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 5, 2018 in-person. Claimant participated personally. Employer participated by attorney Melissa Schilling and witnesses Sherry Miller, Mark Webster and Joel Abbott. Employer's Exhibits 1-15 were admitted into evidence.

**ISSUE:**

The issue in this matter is whether claimant was discharged for misconduct?

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on August 16, 2018. Employer discharged claimant on August 20, 2018 because claimant was found to be sleeping on the job and taking extended breaks after being warned for the same, prior to the incident.

Claimant admitted that he slept during his shift which began at 11:00 p.m. on August 15, 2018 and ended on August 16, 2018. At or around 3:52 a.m. claimant was found on video to have entered a janitor's closet where he had no business reason to be. He remained in that closet until he was seen almost an hour later when he was awoken by his supervisor. Claimant stated that he was feeling ill on that date and had taken over-the-counter pills to address his illness. Claimant had also taken ibuprofen. He stated that soon after taking the over-the-counter medicine that he felt drowsy. Claimant walked outside to get some fresh air. Claimant then went to a janitor's room, found a chair, put his feet up and went to sleep.

Employer attempted to call claimant on his radio to get claimant to do repairs to a machine, but claimant did not answer. Claimant was then called over the intercom and did not answer. Employer searched around the facility and found claimant in a room where he had no business interest. Claimant was snoring when found by employer. Employer then woke claimant and sent him back to work.

Claimant had previously received warnings for taking extended breaks and for sleeping while on the clock. Said initial warning, issued in January of 2018, stated that additional actions against company policy could result in actions up to claimant's termination.

Regarding the use of over-the-counter medicines, the Agreement Between Anderson-Erickson and Teamsters Local 120 (of which claimant was a member) indicates that an employee must notify employer when using prescription or over-the-counter medicines that may affect safety or an employee's ability to do his job. Claimant did not notify employer of his taking over-the-counter medication that would make him drowsy on the night in question. When claimant became drowsy he did not do anything to notify employer of his affected condition. Claimant stated that he could not contact any supervisor as his radio did not work and he physically couldn't make it to the place where the supervisor was working. Employer countered this statement saying that claimant used his radio later in the same night to contact a supervisor, and additionally stated that claimant had never complained of a non-working radio.

Claimant stated that he did not log out from work prior to his going off to sleep. He further stated that he never wants to be absent and didn't ever call in sick.

#### **REASONING AND CONCLUSIONS OF LAW:**

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).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon supra*; *Henry supra*.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, Id. In this matter, claimant's testimony surrounding his taking of the medications, not talking with any supervisor before going off to sleep, and not clocking out from work before he went to sleep indicate a lack of forthright testimony. Employer, on the other hand, gave precise and explicit details of all matters surrounding claimant's sleeping on the job and his history or extended breaks and sleeping at work.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning sleeping on the job. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, constitutes misconduct because claimant knew that extended breaks or sleeping on the job could lead to his termination. On August 16, 2018 claimant did both. This action amounts to effectively stealing from the employer. Not only was claimant not available when called multiple times to do his job, he was still clocked in at work so that he was receiving pay while he was avoiding work and avoiding being caught by hiding in a janitorial room. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

**DECISION:**

The decision of the representative dated September 7, 2018, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

---

Blair A. Bennett  
Administrative Law Judge

---

Decision Dated and Mailed

bab/scn