

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

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**TABITHA L THOMAS**  
Claimant

**APPEAL NO. 23A-UI-03349-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SECURITAS SECURITY SERVICES USA**  
Employer

**OC: 02/26/23  
Claimant: Appellant (2)**

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Iowa Code Section 96.5(2)(a) – Discharge

**STATEMENT OF THE CASE:**

On March 27, 2023, Tabitha Thomas (claimant) filed a timely appeal from the March 17, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on January 20, 2023 for sleeping on the job. After due notice was issued, a hearing was held on April 13, 2023. Claimant participated. Dennis Mullins of Equifax represented the employer and presented testimony through Jennifer Johnson. Exhibits A, and 3 through 13 were received into evidence. There was no Exhibit 1 or Exhibit 2.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Tabitha Thomas was employed by Securitas Security Services USA as a full-time Security Officer from June 2020 until February 3, 2023, when the employer discharged her from the employment for violation of the employer's policy prohibiting sleeping or giving the appearance of being asleep on the job. The claimant last performed work for the employer January 12, 2023.

From about August 2020 until the end of the employment, the claimant was assigned to the Security Center (guard shack) at a ConAgra plant. Throughout the claimant's time at the ConAgra plant, Pam Mann, Security Site Supervisor, was the claimant's immediate supervisor. Ms. Mann reports to Jennifer Johnson, Account Manager. The claimant's work hours were 9:00 a.m. to 5:00 p.m., Monday through Friday. The claimant's duties included checking in guests, documenting the trucks that entered and left the ConAgra property, weighing freight trucks as they entered and exited, monitoring ingress and egress of employees and others, making and issuing employee access badges, transferring telephone calls. The claimant also did the mail run, ancillary cleaning, and perimeter checks.

At the start of the employment, the employer provided the claimant with access to an employee handbook. The handbook included a policy that prohibited sleeping on the job or giving the appearance of sleeping.

At about noon on January 3, 2023, the claimant laid down on the floor within the Security Center. The Security Center was not busy at the time. The claimant has provided conflicting reasons for lying on the floor. When corresponding with the employer about the incident on January 20, the claimant indicated she was on the floor for less than two minutes while she tried to crack her back. At the appeal hearing, the claimant testified she was not feeling well and was on the floor for less than five minutes. Ms. Mann, the supervisor, was contemporaneously aware the claimant was temporarily resting on the Security Center floor. The pair engaged in conversation while the claimant was temporarily supine. The claimant initially rested on the floor in the vicinity of Ms. Mann's work area. At Ms. Mann's suggestion, the claimant moved to a less conspicuous area of the Security Center, where she again temporarily laid down with Ms. Mann's knowledge. The claimant was not asleep and did not knowingly give the appearance that she was asleep. Ms. Mann did not express any disapproval at the time. However, a ConAgra representative took a photo of the claimant and sent the photo to Ms. Mann that same day. After the January 3, 2023 lying down incident, the claimant continued to report for her regular duties until Thursday, January 12, 2023.

On Friday, January 13, 2023, the claimant overslept and did not report for her shift. Later that morning, Ms. Mann contacted the claimant and the claimant reported at that time that she had just awakened.

On Monday, January 16, 2023, the claimant notified Ms. Mann she would be absent from her shift due to illness. The claimant called before the start of her shift, but provided less than four hours' notice of her need to absent. The claimant was feeling ill when she woke up and contacted the employer at that time. The claimant advises that she suffers from Graves' disease. When the claimant spoke to Ms. Mann, Ms. Mann told the claimant she would need to speak with Jennifer Johnson, Account Manager, prior to returning to work.

On Tuesday, January 17, 2023, the claimant met with Ms. Johnson. Ms. Johnson mentioned prior warnings for attendance, advised the claimant she was recommending the claimant be suspended pending "investigation" or review of her attendance, and instructed the claimant to contact human resources to further discuss the matter. The claimant was already effectively suspended and was waiting to be recalled to the employment.

On Wednesday, January 18, 2023, Ms. Johnson spoke with Ms. Mann regarding the claimant's employment status. Ms. Mann did not mention the January 3 incident or photo to Ms. Johnson until the January 18, 2023 contact. At which time, Ms. Mann told Ms. Johnson she "got busy and forgot" to follow up on the matter. During the conversation on January 18, 2023, Ms. Mann asserted to Ms. Johnson that she had upbraided the claimant when the claimant was first down on the floor. Ms. Mann asserted to Ms. Johnson that the claimant had then moved to an area of the Security Center where she was no longer visible to Ms. Mann. Ms. Mann asserted she had been unaware of the claimant being on the floor a second time.

On Friday, January 20, 2023, human resources representative Lydia Thompson contacted the claimant and asserted the claimant had abandoned the employment. When the claimant asserted she had not abandoned the employment and was waiting to hear that she could return, Ms. Thompson told the claimant she was suspended from the employment due to the alleged sleeping incident and for attendance. This was the first time the employer had notified that the January 3, 2023 alleged sleeping or giving the appearance of sleeping incident could be the

basis for discharging her from the employment. On February 3, Ms. Thompson notified the claimant she was discharged from the employment. Ms. Thompson did not at that time mention the reason or reasons for the discharge.

Though the discharge documentation does not mention attendance as a basis for the discharge, Ms. Thompson, the human resources representative, had referenced attendance as a problem during her January 20, 2023 contact with the claimant. Ms. Johnson, the Account Manager, was the employer's sole witness at the appeal hearing and erroneously testified that the most recent attendance matter that factored in the discharge was a late arrival on January 3, 2023. The late arrival was actually on January 2, 2023, with a written reprimand issued on January 3, 2023. On January 2, 2023, the claimant was more than four hours late for her shift due to an issue with her vehicle. The claimant provided notice twenty minutes before the start of her shift. The claimant attempted to call, but Ms. Mann was busy and did not answer. The claimant knew the supervisor was busy between 8:00 a.m. and 9:00 a.m., Pursuant to Ms. Mann's previous instructions, the claimant sent a text message to Ms. Mann when Ms. Mann did not answer the call. The claimant walked to secure a different vehicle and then reported for work.

The employer's exhibits include information pertaining to more recent absences, including a late arrival on January 5, 2023 and the previously mentioned absences on January 13 and 16, 2023. On January 5, 2023, the claimant was late work and called the supervisor 30 minutes before her shift. The claimant then left work early due to illness and upon Ms. Mann's directive.

The employer's exhibits indicate earlier absences and associated reprimands dating back to September 2020. On September 11 and 12, 2020, the claimant elected to be absent from work so that she could travel to Arkansas to be with her extended family while an uncle or cousin was in the hospital. The claimant concedes there was no actual need for her to make the trip to Arkansas. The employer requested a medical note in support of the need to be absent. The claimant did not provide a medical note. The employer issued a reprimand on October 3, 2020. On November 29, 2020, the claimant overslept for a 3:00 p.m. shift. When the claimant awoke, she elected not to report for the shift or to make contact with the employer. Ms. Mann was able to reach the claimant late in the evening. The employer issued a reprimand on December 5, 2020, and included a reminder of the four-hour notice requirement. On January 21, 2021, the claimant was absent from a weekend shift due to illness. Neither the claimant nor the employer recalls when the claimant gave notice of her need to be absent that day. The employer discourages weekend absences due to staffing issues and requires a medical notice in support of a weekend absence. When the claimant did not provide a medical note to cover the absence, the employer issued a reprimand on January 29, 2021. On December 6, 2022, the claimant overslept for her 9:00 a.m. shift. The claimant called the employer at 11:30 a.m., by which time the employer had arranged coverage for the shift. The employer issued a reprimand on December 7, 2022 that included a reminder of the four-hour notice requirement.

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

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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.

...

d. For the purposes of this subsection, “misconduct” means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

- ...
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- ...
- (9) Excessive unexcused tardiness or absenteeism.
- ...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. For the purposes of this rule, “misconduct” is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

- ...
- (2) Knowing violation of a reasonable and uniformly enforced rule of an employer.
- ...
- (9) Excessive unexcused tardiness or absenteeism.
- ...

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused.

See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See Iowa Administrative Code rule 871-24.32(4).

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. *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. *Id.*

The administrative law judge notes the employer elected not to present testimony from Ms. Mann, the individual with personal knowledge of the matters in question. The administrative law judge notes that the employer witness was markedly unprepared for the hearing and provided erroneous and shifting testimony. While the claimant's testimony included minor inconsistencies, the claimant testified candidly from personal knowledge.

The evidence in the record fails to establish misconduct in connection with the alleged violation of the policy pertaining to sleeping or giving the appearance of sleeping. The employer presented insufficient testimony to prove either allegation by a preponderance of the evidence. The weight of the evidence indicates the claimant was on the floor for a brief moment once or

twice with Ms. Mann's knowledge and not for the purpose of sleeping or giving the appearance of sleeping. Whether the claimant was on the floor to crack her back or because she momentarily did not feel well, there was no willful violation of an employer work rule. The fact that a ConAgra representative took the opportunity to snap a photo is not determinative. Given that the evidence indicates Ms. Mann was fully aware and gave tacit approval on January 3, 2023, the evidence further indicate that the incident was no longer a "current act" at the time the employer got around to discussing the matter with the claimant 17 days later on January 20, 2023.

The weight of the evidence fails to establish misconduct in connection with the employment in connection with the attendance issues. The weight of the evidence indicates the most recent absence that factored in the discharge occurred on January 16, 2023, was due to illness, and was reported to the employer a reasonable time before the start of the shift. The employer's requirement that the claimant report absences four hours prior to the shift in the context of a 9:00 a.m. start time was unreasonable. The final absence that factored in the discharge was an excused absence under the applicable law and cannot serve as a basis for disqualifying the claimant for unemployment insurance benefits. Because the evidence indicates the final absence was an excused absence, the administrative law judge need not further consider the earlier absences or whether they were excused or unexcused under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes the claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

**DECISION:**

The March 17, 2023 (reference 01) decision is REVERSED. The claimant was discharged on February 3, 2023 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.



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James E. Timberland  
Administrative Law Judge

April 21, 2023  
Decision Dated and Mailed

r/s

**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: eab.iowa.gov**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.