IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PRESTON V LAWSON
Claimant

PER MAR SECURITY & RESEARCH CORP
Employer

APPEAL NO: 12A-UI-02391-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/22/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Per Mar Security & Research Corporation (employer) appealed a representative's February 28, 2012 decision (reference 01) that concluded Preston V. Lawson (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 27, 2012. The claimant received the hearing notice and responded by calling the Appeals Section on March 16, 2012. He indicated that he would be available at the scheduled time for the hearing at a specified telephone number. However, when the administrative law judge called that number at the scheduled time for the hearing, the claimant was not available; therefore, he did not participate in the hearing. Robert Osterman appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on October 7, 2010. He worked full-time as a security officer at the employer's Shenandoah, Iowa, business client, working on an overnight shift from 12:00 a.m. to 8:00 a.m. His last day of work was January 19, 2012. The employer discharged him on January 23, 2012. The reason asserted for the discharge was that the business client had asked the employer to remove the claimant from the account.

On January 20 the operations manager of the employer's Omaha area branch, Osterman, received an email from the business client asking that the claimant be removed from the account. The reasons cited were that the claimant had stolen a candy bar from the cafeteria counter and that he had been found on a couple occasions sleeping on duty. The employer

understood that the allegation regarding the candy bar was something the business client believed had occurred very recently, but did not have a specific date or any details. The employer had no understanding as to when the incidents of the claimant sleeping on duty were to have occurred, although understood that it could have been even months prior to January 20. When questioned on January 23, the claimant adamantly denied taking a candy bar, but acknowledged that there had been some prior occurrences where he had fallen asleep on duty. Osterman concluded that the allegation regarding the candy bar could not be substantiated, and did not further consider that allegation in making his decision. However, as the employer's policies provide for discharge for an officer who falls asleep on duty, and since the claimant admitted there had been some occasions in the past where he had fallen asleep on duty, Osterman made the decision to discharge the claimant.

While Osterman was not aware of the occurrences of the claimant falling asleep on duty until January 20, the employer's on-site supervisor had been made aware of those concerns and had indicated to Osterman that he had verbally reprimanded the claimant for falling asleep on duty. However, the verbal warning was not documented. Osterman understood that the warning could have been given even months before the business client reported the concern to him on January 20. There was no evidence provided to suggest or establish that there had been an incident of the claimant being asleep on duty after the on-site supervisor had given him the verbal warning.

REASONING AND CONCLUSIONS OF LAW:

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. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such 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. 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 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 of the employee's duties and obligations to the employer. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the conclusion that at some time in the past the claimant had been asleep on duty. Conduct asserted to be disqualifying misconduct must be both specific and current. *Greene v. Employment Appeal Board*, 426 N.W.2d 659 (Iowa App. 1988); *West v. Employment Appeal Board*, 489 N.W.2d 731 (Iowa 1992). Although a security officer sleeping on duty might generally be considered misconduct, the employer has not satisfied its burden to show that there was a current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8). While Osterman might not have been aware of the prior allegations until January 20, the on-site supervisor was aware, and that knowledge is imputed to the employer as a whole for purposes of determining whether the employer was on notice of the conduct so that the "clock" was running for determining whether an act was "current." *Milligan v. Employment Appeal Board*, (unpublished opinion, Ct. of Appeals No. 1-383 / 10-2098, filed June 15, 2011). There is no evidence that there was any additional incident of the claimant sleeping on duty occurred after the on-site supervisor warned the claimant about doing so, apparently as much as months prior to the discharge. While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 28, 2012 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw