BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

JON D SLIGER Claimant, and PER MAR SECURITY&RESEARCH CORP Employer.	:	HEARING NUMBER: 08B-UI-09199 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Jon Sliger, worked for Per Mar Security & Research Corp. from February 15, 2008 through September 15, 2008 as a full-time security guard. (Tr. 2, 6) The employer has a policy that outlines what behaviors constitute misconduct, which include "theft of company time... sleeping... loafing... not being production, being uncooperative or inattentive on the job or contributing to or coercing other employees to slow down their work performance..." (Tr. 3)

While on assignment with the Iowa Department of Transportation (mid-August of 2008), employees at DOT observed and reported seeing Mr. Sliger asleep on the job, which he deined. (Tr. 4) The

employer spoke with the claimant about the matter, but did not document the incident. (Tr. 4, 6) The employer also warned the claimant that if he was caught sleeping on the job again, he would be terminated. (Tr. 4-5)

The claimant suffers from knee pain as a result of a war injury that occurred while he was on duty in Iraq, which he explained to the employer. (Tr. 6, 8, 10) He has been on medication (ibuprofen and muscle relaxers) for this injury since 2004. Whenever he experiences the knee pain, he takes his medication which tends to make him sleepy. (Tr. 6-7) Mr. Sliger did not tell the employer about the side effect of the medications. (Tr. 8, 10)

On September 15th, Mr. Sliger had knee pain. He took his medication prior to making his rounds. (Tr. 7) The client (DOT) again reported observing the claimant asleep. When the employer questioned Mr. Sliger about this second incident, the claimant "… did not comment." (Tr. 5) The employer decided to terminate Mr. Sliger because "[he didn't] feel [he] could take a chance with him somewhere else." (Tr. 5)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment

Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying

misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The claimant does not dispute that he fell asleep on the job the second time, even though he denies being asleep with regard to the first allegation. And although the employer did not document the first incident, the claimant acknowledges the consequences of such action on the job. In light of this past warning, whether he fell asleep or not, Mr. Sliger not only knew of the medications' potential side effect, he should have known that any future incident would result in his termination. While we applaud Mr. Sliger's military service and are empathetic to his injury, the employer still has a right to expect all its employees to satisfy the obligations of their employment.

We agree with the administrative law judge that the "gravity of the incident, number of policy violations and prior warnings are factors [to be] considered with analyzing misconduct…;" however, it is precisely because of the nature of the employer's business that it was imperative for the claimant to be alert and ready to act in the event a security incident occurred. The fact that Mr.Sliger had been warned once makes the second time particularly of concern. We can reasonably assume that the claimant had knowledge that the medication caused him to be drowsy based on his admission of previous experiences. And while we understand his need to have to take the medication (when knee pain dictates), it was incumbent upon him to remain vigilant throughout his shift, or at the very least, take time off or make necessary arrangements. The fact that Mr. Sliger has taken no action to minimize his potential to fall asleep on the job when it is a foreseeable possibility mitigates the involuntariness of his behavior. According to the court in Hurtado v. Iowa Department of Job Service, 393 N.W.2d 309 (Iowa 1986) sleeping on the job is disqualifying misconduct.

DECISION:

The administrative law judge's decision dated October 27, 2008 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied benefits until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Elizabeth L. Seiser

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Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

AMG/ss