IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MELISSA D WILMER
Claimant

WATSON PHARMA INC
SCHEIN PHARMACEUTICAL INC
Employer

APPEAL NO: 12A-UI-02949-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/17/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Watson Pharma, Inc. / Schein Pharmaceutical, Inc. (employer) appealed a representative's March 12, 2012 decision (reference 01) that concluded Melissa D. Wilmer (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 April 9, 2012. The claimant participated in the hearing. Sally Cummings appeared on the employer's behalf. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the employer's account subject to charge?

OUTCOME:

Affirmed. Benefits allowed. Employer exempt in current benefit year.

FINDINGS OF FACT:

The claimant started working for the employer on July 11, 2011. She worked full time as a field sales specialist covering the majority of the state of Iowa. Her last day of work was January 9, 2012. The employer discharged her on that date. The reason asserted for the discharge was falling asleep on duty.

On January 5 the claimant was attending a training conference being held in New Jersey. She had been in a session from 8:00 a.m. to 5:00 p.m., and there was an additional webinar training session scheduled from 6:00 p.m. to 8:00 p.m. The claimant had initially indicated that she would not be present for that session, which included pizza and soda, because she was not

feeling well and thought she would be able to watch the webinar from her computer in her hotel room. When she discovered she was not able to watch the webinar from her computer, she did report to the group location, although she still felt ill with flu-like symptoms affecting her stomach and head.

About 15 minutes into the webinar the claimant realized that she was starting to fall asleep; she informed a coworker that was sitting with her that she was still feeling ill and was leaving. The employer provided second-hand testimony that the claimant had actually fallen asleep during the webinar and that she had left without telling anyone she was leaving. She then returned to her room. Shortly after 8:00 p.m. the training supervisor went to the claimant's room to check on her. She reported that she was feeling better. The employer provided second-hand testimony that the claimant had been giddy and giggling when she spoke to the training supervisor; however, the claimant denied being giddy and denied giggling or laughing. The employer concluded that the claimant had fallen asleep during the training, had not been ill, and that she was making light of the matter, and so determined to discharge her.

The claimant established an unemployment insurance benefit year effective April 17, 2011. She reopened the claim by fling an additional claim effective January 8, 2012.

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 that she had fallen asleep during the training session, left for no good reason, and had not taken the incident seriously. The employer relies exclusively on the second-hand account from the training supervisor;

however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether that supervisor might have been mistaken, whether he actually observed the entire time, whether he is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the supervisor's report. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact fell asleep before leaving, that she was not truly ill, or that she had made light of the situation. The employer 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.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's current base period began January 1, 2010 and ended December 31, 2010. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not chargeable for benefits paid to the claimant during the benefit year which began April 17, 2011.

DECISION:

The representative's March 12, 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 she is otherwise eligible. The employer's account is not subject to charge in the benefit year beginning April 17, 2011.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs