IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JESSE E HOFF Claimant **WINNEBAGO INDUSTRIES** Employer	**APPEAL 15A-UI-13704-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 11/15/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the December 8, 2015, (reference 01) unemployment insurance decision that denied benefits based upon separation. The parties were properly notified about the hearing. A telephone hearing was held on January 6, 2016. The claimant participated personally. The employer participated through Gary McCarthy, Director of Human Resources. Claimant Exhibit A was admitted into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a service repairman and was separated from employment on November 11, 2015, when he was discharged by Gary McCarthy for sleeping on the job.

The employer has a policy prohibiting sleeping on the job, and applies progressive discipline to infractions. The claimant was a six-year employee and had no prior warnings until October 2015, when he was issued a verbal warning October 5, 2015, for sleeping on the job, a written warning on October 6, 2015, for sleeping on the job, and a two-day suspension for sleeping on the job, beginning October 28, 2015. The claimant had a new manager and believed based on conversations with his supervisor, Kevin Bunker, that she was targeting him. In the three prior occasions, the claimant had been observed in various positions in motor homes he was working on, lying on his back, or having his hands in his head. The claimant denied he was sleeping in any of the occasions but accepted the discipline and did not escalate any concerns of targeting to human resources.

The final incident occurred when the employer received reports that the claimant was sleeping on the job between 10:45 a.m. and 11:00 a.m. on November 10, 2015, while clocked in. The claimant was not on an approved break, which would allow him to sleep. The employer reports that six employees including the claimant's manager saw the claimant with his eyes closed, his head in his hands, while sitting in the driver's seat of a motor home being worked on.

Mr. McCarthy asserted a photograph was taken of the claimant as well. Mr. McCarthy did not see the claimant sleeping and no employee who reported to the employer that the claimant was sleeping, attended the hearing or submitted written statements in lieu of participation. Nor was a copy of the photograph purporting the claimant to be asleep submitted at the hearing as evidence.

The claimant acknowledged he did sit in the driver's seat upon completing work involving the dashboard, to regain his strength. The claimant admitted to being tired from ten and eleven-hour shifts. The claimant was aware his job was in jeopardy and being extra careful with his job to not put himself in a position to be fired. The claimant was suspended and subsequently discharged for the final incident of reporting sleeping on the job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
>
> 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 individual shall be disqualified for benefits 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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 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.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer has not satisfied its burden of proof to establish the claimant was discharged for a final act of misconduct.

In this case, the claimant had no prior warnings in employment until he was issued three warnings for allegedly sleeping on the job. The claimant denied sleeping previously and believed he was being targeted by a new supervisor. The final incident that triggered the claimant's separation was the claimant allegedly sleeping at the driver's seat of a motor home he had been working on between 10:45 a.m. to 11:00 a.m. The basis for the claimant's discharge was the employer's assertion that six people including the claimant's manager, observed him sleeping on the job.

The six people with any direct knowledge of the situation, other than the claimant, did not attend the hearing. No request to continue the hearing was made and no written statements of those individuals were offered. The claimant admitted to sitting with his head in his hands after working on the dashboard because he was trying to regain strength, but denied falling asleep or being asleep as alleged by the employer. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the

availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. The evidence presented at the hearing does not support the claimant was sleeping at the driver's seat in the motor home. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

DECISION:

The December 8, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. The benefits claimed and withheld shall be paid, provided he is otherwise eligible.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

jlc/css