

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JODIE SNELL
Claimant

APPEAL NO: 08A-UI-10119-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

**OC: 09-14-08 R: 04
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 20, 2008, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 2, 2008. The claimant participated in the hearing. Tammy Kadlec, Human Resources Manager and Jamie Briesch, Team Member, participated in the hearing on behalf of the employer. Employer's Exhibit's One and Two were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time lead casino cleaner for IOC Services from November 11, 1999 to September 17, 2008. On September 4, 2008, the employer received a note from several employees written by Brian Low reporting the claimant was sleeping on the job in the housekeeping office September 4, 2008 (Employer's Exhibit Two). The employer viewed the surveillance video and noticed the claimant go in the office for 37 minutes; 48 minutes and two hours and 21 minutes September 4, 2008. After reviewing the surveillance footage September 5 and September 6, 2008, the employer called the claimant and asked if she was sleeping September 5 and September 6, 2008, and the claimant admitted she had been sleeping but then said she had a migraine both days and used all of her breaks to take approximately a one hour nap both days. The employer's policy does not allow employees to take naps or to take all of their breaks together without securing permission from management. The employer's policy states that sleeping on the job could result in discipline up to and including termination (Employer's Exhibit One). After reviewing the surveillance tapes and the claimant's admission that she was asleep at work the employer terminated her employment September 7, 2008.

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 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.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

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.

Sleeping on the job on two occasions, one year apart, can constitute job misconduct. Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). The claimant admitted to sleeping on the job on at least two occasions September 4 and September 5, 2008, and while she may not have felt well, her proper course of action would have been to speak to a manager and tell them she had to go home if her head was bothering her that badly. Instead of doing so, however, the claimant slept in the chair in the casino housekeeping office for at least one hour on two different days and stated she combined all of her breaks together to take a long break and sleep. The employer has established that the claimant was warned in the handbook that further incidents of sleeping on the job could result in termination of employment and the final incident of sleeping on the job was not approved. The administrative law judge concludes the claimant's conduct demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. The employer has met its

burden of proving disqualifying job misconduct as defined by Iowa law. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Consequently, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

DECISION:

The October 20, 2008, reference 01, decision is reversed. The claimant was discharged from employment for sleeping on the job. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs