

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DALE R MUDGETT**

Claimant

**APPEAL NO: 11A-UI-06330-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WAGGONER SOLUTIONS CO**

Employer

**OC: 04/10/11**

**Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated May 5, 2011, reference 01, that held the claimant was not discharged for misconduct on March 24, 2011, and benefits are allowed. A telephone hearing was held on June 8, 2011. The claimant participated. Kelly Baum, HR/Safety Director, Kevin Waggoner, President, and Marty Wenke, Day Shift Leader, participated for the employer. Employer Exhibits 1 & 2 and Claimant Exhibit A was received as evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on January 16, 2010, and last worked for the employer as a full-time driver/laborer on March 24, 2011. He knew the employer had a zero tolerance policy for sleeping on the job.

On or about January 24, 2011, supervisor Wenke caught the claimant sleeping across the seat of his truck. He was confronted but not formally disciplined for the incident.

On March 24, the claimant was acting as the safety attendant for a co-worker, Shawn Foe who happens to be his brother. Foe was working in a confined space (tank) to remove resin. It is an OSHA requirement to have a safety attendant available to assist a worker should that person come under duress. Foe began banging on the inside tank and yelling for claimant when he felt distress. When Foe exited the tank, he saw claimant with his eyes closed and tapped him asking what he was doing. Later, Foe found the claimant sleeping again, and reported the incident(s) to his supervisor.

When confronted by the employer, claimant did not deny sleeping on the job, and he was discharged. Claimant contends he had been ill and he was requesting to go home. Claimant had the opportunity in the presence of supervisor Wenke to advise he was ill and wanted to go home on March 24, but did not do so. The claimant did not seek medical care until after his discharge. He had been given a day off before March 24 for drug testing, but did not seek medical care. The test and negative result was not a consideration for discharge. The claimant's doctor slip dated May 2, 2011 does not show claimant was ill with an inner ear infection on March 24 to the point he could not work.

Claimant has been receiving unemployment benefits on his current claim.

**REASONING AND CONCLUSIONS OF LAW:**

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.

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.

The administrative law judge concludes the employer has established claimant was discharged for misconduct in connection with employment on March 24, 2011.

The claimant violated a zero tolerance safety policy issue by sleeping on the job while a co-worker became distressed on March 24, 2011. Although claimant was not disciplined for sleeping on the job on January 24, 2011, he was confronted by his supervisor when caught doing so. Two incidents of sleeping on the job can constitute job misconduct. Hurtado v. IDJS, 376 NW2d 642 (Iowa 1985).

Claimant is refuting his brother/co-worker's (Foe) written statement that he was sleeping on the job. His request to offer testimony of his brother's arrest record and recent jail confinement to attack his credibility was denied, because it is not permissible impeachment. Claimant did not deny this conduct at discharge, and he did not offer any mitigating circumstance until later by presenting some medical information that he had been ill. Claimant's statement he asked to go home due to illness was refuted by supervisor Wenke who saw him on March 24.

The Foe statement is hearsay evidence but it rises to the level of credibility to be considered substantial evidence. Schmitz v. IDHS, 461 NW2d 603 (Ia. App. 1990). Foe reported the sleeping incident to the employer who otherwise would not have known it occurred. The employer confronted Foe who wrote the statement in his own words that was witnessed by an HR representative. Foe is claimant's brother.

Iowa Code § 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant has been disqualified from receiving benefits by reason of this decision, the overpayment issue is remanded to claims for a decision.

**DECISION:**

The department decision dated May 5, 2011, reference 01, is reversed. The claimant was discharged for misconduct on March 24, 2011. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs