

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

JOHN E ANTOMORI  
2525 SW 80<sup>TH</sup> #88  
DES MOINES IA 50321

RICHARD O JACOBSON ET AL  
D/B/A JACOBSON INDUSTRIAL  
SERVICES  
3811 DIXON ST  
DES MOINES IA 50313

Appeal Number: 04A-UI-12803-RT  
OC: 10-31-04 R: 02  
Claimant: Appellant (1)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, John E. Antomori, filed a timely appeal from an unemployment insurance decision dated November 29, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on December 22, 2004, with the claimant participating. Melissa Whitehead, Payroll Specialist, participated in the hearing for the employer, Richard O. Jacobson, et al., doing business as Jacobson Industrial Services. Daniel Bauer and Jose Martinez, testified for the employer at the behest of the administrative law judge.

#### FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The employer is a temporary employment agency. At all material times hereto, the claimant was assigned to Windsor Windows. On October 30, 2004, the claimant was caught sleeping in the restroom. A co-worker, Jose Martinez, now a regular employee of Windsor Windows, noticed the claimant was gone for about 30 minutes. He began looking for the claimant and found him sleeping in the restroom. He had previously observed the claimant sleeping in the restroom on two or three prior occasions. The claimant had also been observed sleeping at least two times on the table, which was his workstation and once on a desk. On each of these occasions the claimant was observed by Daniel Bauer, a co-worker and now a regular employee of Windsor Windows and one of the employer's witnesses. On none of these occasions was the claimant on a break or a lunch period but was rather on the clock for the employer. On these occasions the claimant had his head down on the table or desk with his eyes closed. Mr. Bauer had to wake the claimant up on these occasions. The claimant was also sent home one time for sleeping on the job. The claimant was warned several times by his supervisor about sleeping. On one occasion Mr. Bauer gave the claimant a verbal warning about sleeping on the table.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree on little else but agree that the claimant was discharged on November 2, 2004 and the administrative law judge so concludes. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Although the employer's witness, Melissa Whitehead, Payroll Specialist, testified from hearsay, her testimony was credible that the claimant was caught sleeping in the restroom on October 30, 2004 and because of prior incidents and warnings was discharged. The employer, at the behest of the administrative law judge, obtained two witnesses with firsthand observations of the claimant's propensity to sleep on the job. Both of these witnesses were credible. Daniel Bauer, a group leader for Windsor Windows where the claimant was assigned, credibly testified that he personally observed the claimant sleeping two times on his table and once on his desk and that he had to wake up the claimant numerous times. He testified that he gave the claimant a verbal warning about his sleeping. He also testified that on one occasion the claimant was sent home for his sleeping. Jose Martinez, a co-worker and now a regular employee of Windsor Windows, credibly testified that he observed the claimant sleeping in a restroom on October 30, 2004. He testified that the claimant was gone for a half an hour and he began looking for him and found him in the restroom asleep. The claimant's testimony to the contrary is not credible. The claimant denied sleeping at any time on the job and further denied receiving any warning for sleeping on the job. The claimant finally conceded that he did receive a verbal warning for "leaning" on his table but denied any verbal warnings for sleeping. The claimant conceded that he was in the restroom on October 30, 2004 and eventually even conceded that he had been there for 15 minutes and that he had the stall door shut and locked. However, the bathroom itself was open and others could have gained entrance. The claimant's total denials are not credible in view of the testimony to the contrary. Accordingly, the administrative law judge concludes that the claimant was sleeping on the job and these occasions were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interest and, at the very least, are carelessness or negligence to such a degree of recurrence all as to establish disqualifying misconduct. At one point the claimant said that he was not snoring but was emanating other sounds, which were confused with snoring. The administrative law judge does not find this testimony credible or reasonable. The administrative law judge notes that even the claimant eventually testified that he was in the restroom for 15 minutes. The claimant also testified to the effect that he was taking medication. The administrative law judge does not believe that this is an excuse for the repeated sleeping occasions, which the evidence supports. The claimant received multiple warnings for sleeping on the job. The administrative law judge concludes that what occurred here was far more than ordinary negligence in an isolated instance.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was sleeping on the job on a number of occasions and that these incidents were disqualifying misconduct. Therefore, the administrative law judge concludes that the

claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of November 29, 2004, reference 01, is affirmed. The claimant, John E. Antomori, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

pjs/b