

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**BRENDA L FISCHER**  
Claimant

**TENCO INDUSTRIES INC**  
Employer

**APPEAL 18A-UI-05727-NM-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 04/29/18**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the May 15, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for sleeping on the job. The parties were properly notified of the hearing. A telephone hearing was held on June 11, 2018. The claimant participated and testified. Witness Michelle Gear also participated on behalf of the claimant. The employer participated through Residential Coordinator Tracy Barnett, Human Resource Director Angela Lennie, and Residential Team Lead Lisa Davis.

**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: Claimant was employed full time as a direct support professional from July 11, 2005, until this employment ended on April 30, 2018, when she was discharged.

On April 26, 2018, Davis did an unannounced visit at the home where claimant was working. Davis did this visit at the direction of Barnett who, one week earlier, had received a report of claimant sleeping on the job. When Davis arrived she found claimant sitting in a recliner with her eyes closed. Davis walked around the living area, confirmed other staff members were present, and then stood observing claimant for approximately 20 minutes. After 20 minutes Davis went back over to claimant, tapped her knee, and said her name. Claimant opened her eyes and said she had a headache. The employer's policies, which claimant received a copy of, specifically prohibit sleeping on the job. (Exhibit 3). Davis told claimant to gather her things and that she was being suspended. Claimant gathered her things and left. On Monday, April 30, 2018, claimant came in and met with Davis. Davis notified claimant she was being discharged for falling asleep while at work. (Exhibit 1).

Claimant testified she was aware sleeping on the job was against policy and could result in discharge, but that she was dozing rather than sleeping. Staff members, including claimant,

had been told by supervisors in weekly meetings that they understood people would sometimes get drowsy. During the meeting employees were given tips for waking up if they felt themselves dozing off, such as standing up, going outside, or splashing water on their faces. Claimant testified she believed sitting with her eyes closed for 15 to 20 minutes would be considered dozing so it would be okay. Claimant also noted that other employees would fall asleep at work but were not discharged. Barnett testified, in her experience, whenever management discovered an employee sleeping at work, that employee was discharged. Claimant acknowledged she never reported the employees whom she observed sleeping to Barnett or Davis.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The claimant does not dispute that she was sitting in a chair, with her eyes closed, for between 15 and 20 minutes while on duty. Claimant also acknowledged she was aware sleeping on the job violated company policy and could result in discharge. Claimant contends what she was doing was not sleeping, but was dozing, and therefore allowable. Claimant's argument is not convincing. The claimant's conduct shows a deliberate disregard of the employer's interests and is disqualifying, even without prior warning.

**DECISION:**

The May 15, 2018, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs