

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA JORDAN
Claimant

APPEAL NO: 16A-UI-13609-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PDG PRINTING LLC
Employer

**OC: 11/13/16
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 13, 2016, 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 January 17, 2017. The claimant participated in the hearing. Lisa McIlrath, Owner, participated in the hearing on behalf of the employer.

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 part-time graphic designer for PDG Printing from September 12, 2016 to November 2, 2016. She was discharged for napping under her desk September 30, 2016.

The claimant was generally scheduled to work Mondays, Wednesdays, and Fridays and the employer had several conversations with the claimant as she did with all employees. The claimant was five minutes late September 12, 2016, which was her first day. The employer asked the claimant how it was going September 16, 2016. On September 23, 2016, the employer talked to the claimant about a “meltdown” she had September 21, 2016. The claimant was having a difficult time keeping up with even light days and told the employer there was a negative “vibe” in the office but could not specify if that was coming from a co-worker or a client. The claimant also indicated she was having a hard time multi-tasking. On September 28, 2016, the employer talked to the claimant about its concerns regarding her ability to keep up with her job tasks without showing frustration. It also talked to her about how she greeted people. On October 7, 2016, the employer talked to the claimant about being caught by a co-worker sleeping under her desk September 30, 2016. Also on that date the employer talked to the claimant about taking too many walks per day and not keeping up with a small workload. On October 18, 2016, the claimant texted the employer to say she would be 30 minutes late and the employer stated that was okay. On October 19, 2016, the claimant asked the employer if she

could go rest in her car and the employer gave her permission. The employer does not have scheduled breaks and does not know if this break occurred during the claimant's lunch period. On October 24, 2016, the claimant was tardy because she had a doctor appointment. On October 25, 2016, she worked a half-day and the employer noted the claimant seemed to have a difficult time physically with the job because she was doing a great deal of standing and performing full stretches in front of clients. On October 26, 2016, she was off work and the employer finished several of the claimant's jobs. While doing so the employer discovered several errors made by the claimant. On October 27, 2016, the claimant came in at 11:00 a.m. On October 28, 2016, the claimant was off again. On October 31, 2015, the claimant was 30 minutes late because her son was ill and she had to find a baby sitter for him. She texted the employer to notify her of the situation and the employer indicated it was okay but concluded the claimant was showing a pattern of absenteeism and tardiness in the 23 days she worked for the employer.

On November 2, 2016, the employer terminated the claimant's employment for sleeping under her desk September 30, 2016.

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.

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(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.

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The employer cited the claimant sleeping under her desk September 30, 2016, as the main reason for her decision to terminate the claimant's employment November 2, 2016. However, the employer spoke to the claimant about that incident October 7, 2016, and because the employer was aware of the incident for approximately one month and had already disciplined the claimant about that situation the September 30, 2016, napping incident cannot be considered a current act of misconduct.

The employer also listed 10 dates where she had verbal conversations with the claimant about various work performance issues and appears to consider those verbal warnings. In her recounting of the content of those discussions, however, many could not be considered disciplinary in nature, including the September 16, 2016, conversation when she spoke to the claimant about how her first week of work was going and October 18, October 19, October 24 and October 31, 2016, which included discussions about the claimant's attendance when the employer had approved her absences or incidents of tardiness and which were properly reported.

The claimant did not meet the employer's expectations and may not have had the ability to do so. The employer told the claimant at the time of termination she was not a "good fit" and that is likely a correct assessment of the situation.

Because the employer stated the final straw and the main reason for the termination was the September 30, 2016, sleeping under her desk, the administrative law judge must conclude that was not a current act of misconduct and the employer has not met its burden of proving disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The December 13, 2016, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs