

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**LAURA R CORDOVA**  
Claimant

**HARVEYS IOWA MANAGEMENT CO INC**  
Employer

**APPEAL 17A-UI-11765-SC-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 10/22/17**  
**Claimant: Respondent (1R)**

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Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment  
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

**STATEMENT OF THE CASE:**

Harveys Iowa Management Co, Inc. (employer) filed an appeal from the November 8, 2017, reference 01, unemployment insurance decision that allowed benefits based upon the determination Laura R. Cordova (claimant) was discharged but did not engage in willful or deliberate misconduct. The parties were properly notified about the hearing. A telephone hearing was held on December 7, 2017. The claimant participated. The employer was represented by Jaquelyn Toriz from Talx UCM and participated through Human Resources Generalist Salia Nazarie and Assistant Hotel Manager Timothy Busse. The Employer's Exhibits 1 and 2 were received without objection. Official notice was taken of the administrative record, specifically the fact-finding documents.

**ISSUES:**

Was the claimant discharged for disqualifying job-related misconduct?  
Has the claimant been overpaid unemployment insurance benefits and, if so, can the repayment of those benefits to the agency be waived?  
Can charges to the employer's account be waived?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Hotel Services Supervisor beginning on March 10, 1999, and was separated from employment on October 19, 2017, when she was discharged. In 2010, the claimant developed and was diagnosed with severe sleep apnea, which occasionally caused her to fall asleep during normal activities. She told the employer about it at that time and they just told her to alert her staff so they would know if she fell asleep what was happening.

On September 19, 2016, the claimant was given a documented coaching for falling asleep at her desk. She reiterated at that time that it was due to her impairment. The employer asked

her doctor to complete accommodation paperwork related to her sleep apnea. She then went on medical leave for an unrelated condition.

The week after she returned from leave, the claimant was sent home as the employer had no way of accommodating her issues related to sleep apnea. The claimant contacted Disability Rights Iowa to assist her in the interactive process. Ultimately, the employer purchased a device to be placed on the claimant's ear which issued a buzzing tone when the claimant started to fall asleep at her desk. The claimant wore the device for approximately three months and then stopped because it was not waking her up when she would fall asleep.

On May 10, 2017, the claimant received a written warning related to sleeping during a transportation ride-along. She was reminded to stay awake and alert. She explained to the HR Generalist at that time that she was unable to control the behavior and that the device was not effective. She was asked to complete additional accommodation paperwork. The claimant submitted it to her doctor and believed the doctor had returned it to the employer. The claimant started using a bi-pap machine for her sleep apnea instead of a c-pap and took medication to help her remain alert to prevent intermittent sleeping.

On October 15, 2017, two employees reported to Assistant Hotel Manager Timothy Busse that the claimant was asleep at her desk. The employer investigated and asked the claimant if she was asleep at her desk. She did not recall being asleep. The employer asked again for the accommodation paperwork which the claimant believed had been submitted. Twenty minutes after requesting the documentation, the claimant was discharged for sleeping on the job.

The administrative record reflects that the claimant has received unemployment benefits in the amount of \$3,311.00, since filing a claim with an effective date of October 22, 2017, for the seven weeks ending December 9, 2017. The administrative record also establishes that the employer did provide written documentation that, without rebuttal, would have resulted in disqualification. The issue of whether the claimant is able to and available for work due to her inability to stay awake for eight hours has not yet been addressed at the claims level.

#### **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. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. 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).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The claimant has a documented medical issue which caused her to fall asleep during normal activities. She sought to correct her behavior through different forms of medical intervention. During the final incident, the claimant was observed asleep at her desk in front of her computer. There is no indication she made a choice to sleep while at work. The conduct for which the claimant was discharged cannot be classified as willful or deliberate. It also cannot be classified as an intentional and substantial disregard of the employer's interests or of her duties and obligations to the employer. Accordingly, benefits are allowed.

As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived. The issue of whether the claimant is able to and available for work

due to her inability to stay awake for eight hours is remanded to the Benefits Bureau for an initial investigation and determination.

**DECISION:**

The November 8, 2017, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. As benefits are allowed, the issue of overpayment is moot and charges to the employer's account cannot be waived.

**REMAND:**

The issue of whether the claimant is able to and available for work due to her inability to stay awake for eight hours is remanded to the Benefits Bureau for an initial investigation and determination.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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