

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARESHA A SALLEY
Claimant

SYSTEMS UNLIMITED INC
Employer

APPEAL NO. 21A-UI-06616-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/27/20
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 18, 2021, reference 01, decision that allowed benefits to the claimant provided the claimant met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 19, 2020 for no disqualifying reason. After due notice was issued, a hearing was held on May 11, 2021. The claimant did not provide a telephone number for the appeal hearing and did not participate. Mary Bartachek represented the employer and presented additional testimony through Gwen Garretson. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibit 1 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

The United States Postal Service returned the claimant's hearing notice to the Appeals Bureau as undeliverable as addressed. The Appeals Bureau received the returned correspondence on April 21, 2021. On that same day, an Appeals Bureau clerk emailed to the claimant at the email address of record the hearing notice, along with the employer's appeal letter. The claimant did not respond.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The employer, Systems Unlimited, provides home and community based support services to individuals with intellectual disabilities. Clients served by Systems Unlimited have differing needs for physical support, with some requiring physical support and others being more independent. Systems Unlimited clients live in a home shared by a small number of clients. Systems unlimited provides 24 hour/ seven day a week support to the clients.

The claimant was employed by Systems Unlimited from January 2020 until September 21, 2020, when the employer discharged the claimant from the employment in connection with a September 19, 2020 sleeping incident. The claimant began the employment as a full-time Supported Living Supervisor. Effective August 23, 2020, the claimant voluntarily stepped down to the position of full-time Lead Direct Support Professional. The claimant was assigned to provide services to four clients who resided together in a condominium unit. The claimant regularly worked overtime work hours.

At 8:00 a.m. on Saturday, September 19, 2020, the claimant began a shift that was supposed to last until 8:00 p.m. on Sunday, September 20, 2020. At about 12:10 p.m., the claimant fell asleep on a couch while holding a pen and tablet. Because the home required two staff members, another staff member, Jennifer Wheeler, was present. Ms. Wheeler discovered the claimant sleeping, but was unable to wake the claimant. The claimant remained in a deep sleep for about three hours, despite the usually high noise level in the home, despite various persons coming and going, and despite the doorbell ringing in connection with a food delivery. While the claimant was asleep two client guardians were in the home, expressed concern, and suggested summoning law enforcement. The clients were also upset out of concern for the claimant. Ms. Wheeler phoned Gwen Garretson, Supported Living Coordinator, who was the weekend on-call supervisor. When Ms. Garretson arrived at the home at 3:15 p.m., the claimant was still asleep on the couch, but woke to answer a phone call to her cell phone. The claimant terminated the call when Ms. Garretson introduced herself and stated her purpose for being at the home. The claimant remained groggy as Ms. Garretson interacted with her. When Ms. Garretson notified the claimant that she had to leave the shift, the claimant became rude and faulted Ms. Wheeler for failing to wake her. Ms. Wheeler and the two guardians were present. The employer was aware that the claimant sometimes took a prescription medication that made her drowsy. A few months earlier, the claimant had signed an agreement to not take the medication while at work. The employer does not know what the medication was. When Ms. Garretson asked the claimant whether she had taken her medication, the claimant stated instead that she was tired from moving boxes at home. The employer placed the claimant off work pending further investigation of the incident.

On September 21, 2020, Mary Bartachek, Human Resources Manager, and Tammy Reynolds, Program Administrator, interviewed Ms. Salley and Ms. Wheeler regarding the incident. When the employer contacted the claimant to arrange the meeting, the claimant made the unsolicited statement that she had not been under the influence of a substance on September 19, 2020. On September 21, the claimant provided a somewhat confused statement in which the claimant jumbled the times involved in the sleeping incident. The claimant conceded that she could have been asleep for three hours, but asserted the inability to rouse her was attributable to her being a very sound sleeper. The claimant repeated the assertion that she was tired from moving boxes at home. Ms. Wheeler provided a detailed statement consistent with her earlier reports to the employer. The employer subsequently discharged the claimant from the employment. There was no other basis for the discharge.

REASONING AND CONCLUSIONS OF LAW:

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The evidence in the record establishes a legitimate employer concern, but does not establish misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits. The weight of the evidence establishes that the claimant dozed off around noon on September 19, 2020 and could not be roused until three hours later. The weight of the evidence establishes that the claimant reported to work without being sufficiently rested in preparation for the weekend-long shift. The weight of the evidence does not establish that the claimant intentionally went to sleep. Instead, the claimant dozed off while holding a pen and tablet. The circumstances of the claimant's slumber were understandably disconcerting to others present. Why Ms. Wheeler did not promptly summon a supervisor is a mystery. The depth of slumber suggests that the claimant was either under-rested or that the claimant had in fact taken the prescription medication that made her groggy. There is insufficient evidence in the record to determine which it was. There is insufficient evidence in the record regarding the particular prescription medication and insufficient evidence to establish that taking the medication, if that is what happened, would rise to the level of an intentional and substantial disregard of the employer's interests. There is no evidence of any prior similar incident, meaning this was an isolated incident. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 18, 2021, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.



James E. Timberland
Administrative Law Judge

May 18, 2021
Decision Dated and Mailed

jet/kmj