

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VEDRAN DJURIC
Claimant

APPEAL NO: 11A-UI-13124-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA
Employer

OC: 09/04/11
Claimant: Respondent (2/R)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct
Iowa Code § 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Wells Fargo Bank NA (employer) appealed an unemployment insurance decision dated September 30, 2011, reference 01, which held that Vedran Djuric (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2011. The claimant participated in the hearing. The employer participated through Manager Gary Jensen, Collections Manager Arika Brindley, and Employer Representative Shawn Lampell. Employer's Exhibits One through Three were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time collector from September 21, 2009 through September 6, 2011. He was discharged for repeatedly sleeping at his desk and failure to perform. On April 5, 2011, Supervisor Krystina Barbour observed the claimant sitting at his desk with his eyes closed and without moving. She asked him if he was alright and if he needed a break and he declined. Later on in April 2011, Collections Manager Arika Brindley also found the claimant sleeping and coached him that his behavior was inappropriate and must stop. Ms. Brindley reminded the claimant that he had been caught sleeping by her, his team lead and his supervisor.

On May 31, 2011 the claimant's supervisor and team lead again observed the claimant was sleeping and he was tapped on the shoulder until he responded. Ten minutes later, he was sleeping again and he was tapped on the shoulder again. Five minutes after that, Ms. Brindley went to his desk and waited for him to respond but he did not respond so Ms. Brindley tapped

him on the shoulder and told him that he needed to “get yourself together and remain alert and awake.”

As a result of these instances, the claimant received a formal written warning on June 1, 2011 at 1:50 p.m. for sleeping on the job. The warning also advised him that he could be subject to termination if he continued to violate this policy or others. At 3:17 p.m. that afternoon, he was observed sleeping again.

The claimant received a formal written warning for performance on July 18, 2011. The warning indicated the claimant was not meeting the employer’s performance standards due to his excessive personal cell phone use. The employer expects employees to keep personal cell phone calls to a minimum and that employees should only use their cell phones during break and lunch times. The employer again reminded the claimant that his job was in jeopardy for continued policy violations.

Supervisor Gary Jensen and Ms. Brindley both observed the claimant sleeping at his desk on September 5, 2011 at 7:50 a.m. and again at 8:03 a.m. The employer was aware of no medical reasons which may have contributed to the claimant’s inability to remain awake during work hours. The employer discharged him on the following day.

The claimant filed a claim for unemployment insurance benefits effective September 4, 2011 and has received benefits after the separation from employment.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged on September 6, 2011 for repeatedly sleeping on the job. Sleeping on the job may constitute misconduct that would disqualify a claimant 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. In the case herein, the claimant was observed sleeping on the job eight different times within a four-month period. The claimant's habit of sleeping on the job shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

Iowa Code § 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code § 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The unemployment insurance decision dated September 30, 2011, reference 01, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs