

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**DANIEL P AYERS
4730 CHATHAM LN
SIOUX CITY IA 51104-1163**

**SOMNITECH INC
ADP-UCS
PO BOX 6501
DIAMOND BAR CA 91765-8501**

**Appeal Number: 06A-UI-05936-HT
OC: 05/07/06 R: 02
Claimant: Respondent (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Somnitech, filed an appeal from a decision dated May 31, 2006, reference 01. The decision allowed benefits to the claimant, Daniel Ayers. After due notice was issued, a hearing was held by telephone conference call on June 26, 2006. The claimant provided a telephone number of (515) 371-2379. That number was dialed at 8:59 a.m. and the only response was a voicemail which clearly identified it as belonging to the claimant. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 9:16 a.m., the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the

hearing notice. The employer participated by Human Resources Director Jennifer Vargo and Clinical Administrator Rhonda Gillette.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Daniel Ayers was employed by Somnitech from June 6, 2005 until May 5, 2006. He was a full-time sleep technician working 7:00 p.m. until 7:00 a.m. His job was to prepare clients for the sleep study and then provide direct care throughout the night, monitoring the client every 30 minutes. The employer's policies are contained in a handbook received by Mr. Ayers at the time of hire. Because sleep technicians provide direct one-on-one care for the clients, sleeping on the job is considered a dischargeable offense for even one occurrence.

An employee reported to the branch manager that Mr. Ayers had been sleeping on the job on April 5 and 11, 2006. The branch manager is the sister of the claimant and she did not fire him, merely gave him a verbal counseling. When Clinical Administrator Rhonda Gillette was in the Des Moines, Iowa, office on May 4, 2006, she was informed by two different employees about the sleeping on the job incidents. One employee even had pictures taken with a cell phone of Mr. Ayers sleeping on April 11, 2006.

There was another incident of sleeping on the job after that date, as well as an incident on April 16, 2006, where a client showed up for his sleep study at 8:00 p.m. as scheduled and the claimant was not at the facility. The client had to contact the sales staff and they finally located the claimant who arrived two and one-half hours late to set up the client's sleep study.

Ms. Gillette interviewed Mr. Ayers and he did not admit or deny sleeping on the job even after being shown the pictures taken by the other employee. He only maintained he had done his 30-minute checks on schedule. The clinical administrator consulted with Human Resources Director Jennifer Vargo and the decision was made to discharge the claimant. Ms. Gillette notified him in person on May 5, 2006.

Daniel Ayers has received unemployment benefits since filing a claim with an effective date of May 7, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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 claimant was aware of the employer's policies regarding sleeping on the job. The fact that he was not discharged when the report was made to the branch manager has more to do with the fact that the branch manager was his sister rather than any lack of misconduct on his part. As a sleep technician he must monitor the client throughout the night and cannot do this if he is sleeping. The counseling from the branch manager did not result in Mr. Ayers conducting himself more appropriately because he not only slept while on duty on another occasion, but was substantially late for an appointment with a client who had to wait over two hours before his sleep study could begin.

The claimant's conduct was irresponsible and endangered the client by not performing the necessary monitoring duties. In addition, Mr. Ayers was not being paid to sleep but to remain awake and alert and ready to respond to any problems which might have arisen. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment

compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 31, 2006, reference 01, is reversed. Daniel Ayers is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$324.00.

bgh/cs