

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PRESTON G LINLEY
Claimant

APPEAL NO. 09A-UI-03823-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ADVANCED EYECARE ASSOCIATES OF
EASTERN IOWA PC**
Employer

OC: 01/18/09
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Preston Linley filed a timely appeal from the March 2, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 13, 2009. Dr. Linley participated. Attorney John Carr represented the employer and presented testimony through Dr. Elizabeth Zingula, Dr. Shawn Beilby, and Mary Langel, Receptionist.

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: Dr. Preston Linley was employed by Advanced Eyecare Associates of Eastern Iowa, P.C., as a full-time optometrist from August 18, 2008 until January 20, 2009, when Dr. Elizabeth Zingula and Dr. Shawn Beilby discharged him from the employment. Dr. Zingula is corporation president. Dr. Beilby is corporation secretary. Drs. Beilby and Zingula are husband and wife. Dr. Linley is a former classmate of both.

The final incident that triggered the discharge occurred on January 20, 2009. The doctors shared a computer in a back office. On January 20, Dr. Linley used his access to the shared computer to open private correspondence between Dr. Zingula and Dr. Beilby. Dr. Beilby had left his e-mail computer window open, but minimized at the bottom of the computer screen. Dr. Linley intentionally accessed Dr. Beilby's e-mail account and opened the correspondence between Dr. Zingula and Dr. Beilby. The e-mail message in question concerned the employers' feelings about Dr. Linley's performance and continued presence in the workplace. Dr. Beilby returned to the office a short while later and confronted Dr. Linley about accessing the e-mail message. Dr. Linley acknowledged he had in fact reviewed the message.

In making the decision to discharge Dr. Linley, the employers also considered Dr. Linley's tardiness and other attendance issues. Dr. Linley was required to be in the office by 8:15 a.m. on weekdays and by 7:45 a.m. on Saturdays so that he was ready to see patients at 8:30 a.m. and 8:00 a.m. respectively. The final tardiness that factored into the discharge occurred on the last day of the employment, when Dr. Linley appeared at or after 8:25 a.m. for personal reasons. Dr. Linley had also been late for personal reasons on September 11, 16, and 25, October 8 and 21, November 11 and 22. On September 27, Dr. Linley failed to appear for work on Saturday morning. Dr. Linley had called Dr. Zingula the previous afternoon as he was heading out of town. Dr. Linley discussed having the afternoon of September 27 off, but did not reference the morning or that he had patients scheduled. Dr. Zingula had to cover his patient appointments on September 27. On September 29, the employer counseled Dr. Linley about being absent from work without prior approval. On December 29 through January 2, Dr. Linley scheduled himself off work without properly notifying or getting approval from Dr. Zingula or Dr. Beilby. On January 4, Dr. Zingula and Beilby met with Dr. Linley to discuss the lapse in communication and to discuss concerns the employers had about the quality of care Dr. Linley was providing to patients.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

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). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence leads the administrative law judge to conclude that testimony presented by the employer is more credible than Dr. Linley's testimony. Dr. Linley asserted he was never late, that he was always early, and that he would get to work early so he could shovel the walk. The weight of the evidence, including the testimony of Ms. Langel, indicates that Dr. Linley's assertions simply cannot be true. The evidence indicates that the employer and other staff routinely noted Dr. Linley's late arrival at the workplace. Dr. Linley's blanket assertions of punctuality in the face of evidence indicating frequent tardiness impacts negatively on Dr. Linley's credibility generally.

The weight of the evidence in the record establishes that Dr. Linley knowingly and intentionally accessed private e-mail correspondence between Dr. Zingula and Dr. Beilby on January 20, 2009. The weight of the evidence does not support Dr. Linley's assertion that he accidentally happened upon the correspondence.

The weight of the evidence establishes excessive unexcused tardiness and other absences. The evidence indicates that Dr. Linley was tardy for personal reasons on the last day of the employment and had been tardy for personal reasons several times before. The evidence indicates that Dr. Linley was absent without seeking prior approval in September and at the end of December/beginning of January. The unexcused absences were excessive. The administrative law judge concludes that the unauthorized e-mail access constituted misconduct. The administrative law judge concludes that the unexcused absences constituted misconduct.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Dr. Linley was discharged for misconduct. Accordingly, Dr. Linley is disqualified for benefits 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 employer's account shall not be charged for benefits paid to Dr. Linley.

DECISION:

The Agency representative's March 2, 2009, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance,

provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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