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

JOHN C MCCREERY
Claimant

HCM INC
Employer

APPEAL NO: 09A-UI-14474-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/02/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

HCM, Inc. (employer)) appealed a representative's September 18, 2009 decision (reference 01) that concluded John C. McCreery (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 27, 2009. The claimant participated in the hearing and was represented by Brandon Gray, attorney at law. Jeff Woolum appeared on the employer's behalf. During the hearing, Claimant's Exhibit D was entered 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:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 3, 2008. He worked full time as a maintenance supervisor in the employer's long-term care nursing facility. His last day of work was July 20, 2009. The employer discharged him on that date. The reason asserted for the discharge was unsatisfactory job performance.

Mr. Woolum became the administrator of the facility on June 8, 2009. There had not been any prior disciplinary issues regarding the claimant. Mr. Woolum became concerned regarding the amount of maintenance work that needed to be done in the facility, including work that appeared to have been pending for some time even prior to his arrival. One issue in particular was a room in the skilled nursing wing that needed new drywall in the ceiling. On about July 8 Mr. Woolum discussed the room with the claimant, indicating that he was going to be gone the week of July 13 through July 17, but would like the claimant to get that room done during this week.

When Mr. Woolum returned on August 20 he found nothing had been done to the room in question. In speaking to about three other staff persons, he was told the claimant had been

difficult or impossible to find in the building during the week Mr. Woolum was gone, and that the claimant had called in sick after picking up his check on July 17, although he was later seen driving in a northern outlying community. As a result, he determined to discharge the claimant.

The claimant acknowledged that he had agreed to try to get the work done on the room in question during the week of July 13. However, he had ended up spending some additional time on other water damage caused by a windstorm in the early hours of July 10, and had covered weekend manager hours that weekend as well. He spent some time working on another room that also had a drywall issue. On July 14 he spent significant time replacing a kitchen roof vent fan motor. On July 15 there had been an unexpected fire marshal visit, on which the claimant accompanied the fire marshal and then began work on some of the items listed for correction.

On July 17 he had reported in for work as scheduled at 8:00 a.m., and had commented to at least two employees about the time he picked up his paycheck that he was not feeling well. Shortly after 10:00 a.m. he drove out toward a storage building maintained by the employer on the north side of town. As he drove, he became more ill, finally vomiting. As a result, he called into the employer and indicated he was not going to be returning as he was ill. He then drove to a friend’s house that was located in the northern portion of the community to see if that friend might have some over-the-counter medicine for his nausea.

While the claimant realized that Mr. Woolum was desiring the skilled nursing room get finished before July 20, he did not realize that Mr. Woolum placed a priority on that room above some of the other projects the claimant had underway. He also was not aware that his job was in jeopardy if he failed to get the work on that room done by July 20.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. <u>Cosper v. IDJS</u>, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant’s employment, but whether the claimant is entitled to unemployment insurance benefits. <u>Infante v. IDJS</u>, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. <u>Pierce v. IDJS</u>, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; <u>Huntoon v. Iowa Department of Job Service</u>, 275 N.W.2d 445 (Iowa 1979); <u>Henry v. Iowa Department of Job Service</u>, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; <u>Huntoon</u>, supra; <u>Henry</u>, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is his unsatisfactory job performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. At a minimum, in order to establish the necessary element of intent, the final incident of poor performance must have occurred despite the claimant's knowledge that the occurrence could result in the loss of his job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant had not previously been warned that his job performance was unsatisfactory and that his job was in jeopardy. There is no evidence the claimant intentionally failed to perform work as required during the week ending July 17. While the employer may have had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 18, 2009 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs