

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

WILLIAM D NALAN  
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ABCM CORPORATION  
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HAMPTON IA 50441

Appeal Number: 05A-UI-01319-JTT  
OC: 01/01/05 R: 02  
Claimant: Respondent (1)

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

ABCM filed a timely appeal from the January 28, 2005, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on February 22, 2004. William Nalan participated in the hearing. ABCM participated through Todd Allbee, Human Resources Consultant, and witness Kathy Meyer-Allbee, Administrator of Dumont Wellness Center. Exhibits One, Two, and Three were received into evidence. The administrative law judge issued a subpoena for Roger Grover, but Mr. Grover did not respond to the subpoena. The employer elected to proceed with the hearing as scheduled without the testimony of Mr. Grover, rather than have the administrative law judge reschedule the hearing and take additional steps to secure the witness for the hearing.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Nalan was employed by ABCM as a full-time maintenance employee from December 17, 2001 until December 31, 2004, when Richard Allbee, Chief Executive Officer, discharged him for misconduct based on abuse of the employer's sick leave policy. The last incident that prompted Mr. Allbee to discharge Mr. Nalan concerned Mr. Nalan's absence from work on December 29-31, 2004.

In addition to working for ABCM, Mr. Nalan is a business owner. Mr. Nalan owns and operates a bowling alley and attached restaurant. In mid-December 2004, Mr. Nalan asked Richard Allbee if he could use accrued vacation leave for the week of December 20-24, so that he could perform work at the bowling alley and restaurant. Mr. Nalan was initially granted the time off, but received a facsimile from Todd Allbee two days later rescinding the approval. Mr. Nalan then requested December 27-31 off for the same reason. During this time period, ABCM was in the midst of remedying fire safety code violations at the Dumont Wellness Center. ABCM had been granted to January 15, 2005 to remedy the code violations. Todd Allbee advised Mr. Nalan that he could take December 27-28 off, provided the work at the nursing home had been completed.

On the evening of December 28, Mr. Nalan was at the bowling alley when Roger Grover, a maintenance worker employed by the Dumont Wellness Center, also happened to be at the bowling alley. On the morning of December 29, Mr. Grover reported, in a conversation with Kathy Meyer-Allbee, Administrator of Dumont Wellness Center, the director of nursing and an administrative assistant, that he had spoken to Mr. Nalan the night before at the bowling alley. Mr. Grover indicated that he was not sure if Mr. Nalan was serious, but that Mr. Nalan had indicated he was going to call in sick on December 29, though he was not actually ill. Mr. Grover further indicated that he desired no further involvement in the matter. Ms. Meyer-Allbee reported Mr. Grover's comments to Richard Allbee. Mr. Nalan did call in sick on December 29 and indicated to Richard Allbee's secretary that he was sick with diarrhea.

On December 30, Richard Allbee checked with his secretary and learned that Mr. Nalan had again called in sick. In the early evening on December 30, Ms. Meyer-Allbee decided to stop at the bowling alley to investigate whether Mr. Nalan was actually ill. Ms. Meyer-Allbee went to the locked glass door of the restaurant and saw someone inside. That person summoned Mr. Nalan. Mr. Nalan came to the locked glass door, smiled and greeted Ms. Meyer-Allbee. Ms. Meyer-Allbee then stated, "I thought you were sick." Mr. Nalan replied that he was sick. Ms. Meyer-Allbee concluded that Mr. Nalan did not look sick, and left.

Mr. Nalan worked for ABCM from 6:00 a.m. to 2:00 p.m., Monday through Friday. Despite having called in sick on December 29, Mr. Nalan had gone into the bowling alley at 6:30 p.m. and worked until 10:30 p.m., because one of his employees had called in sick. Despite having called in sick on December 30, Mr. Nalan had gone into the bowling alley at approximately 6:00 p.m. to fix a broken machine. Mr. Nalan had just arrived at the bowling alley when a patron expressed a desire to look at the steakhouse that was being constructed on the premises. This is when Ms. Meyer-Allbee arrived. Mr. Nalan subsequently fixed the broken machine and went home. On both evenings, Mr. Nalan felt compelled to go into the bowling alley, sick or not, to address the needs of his business on a busy league bowling night.

Mr. Nalan subsequently called in sick on December 31. Later that day, Mr. Nalan's brother, who also worked for the Allbees, notified Mr. Nalan that Mr. Nalan had been fired. On December 31,

Richard Allbee did in fact send Mr. Nalan a letter via certified mail, advising that he was discharged for abuse of the sick leave policy.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Nalan was discharged for misconduct in connection with his employment.

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).

Since Mr. Nalan was discharged, 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). Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification. See 871 IAC 24.32(9).

The evidence in the record establishes that the employer suspected that Mr. Nalan abused the employer's sick leave policy on December 29-31 so that he could attend to matters at his own business. The evidence further establishes that on the morning of December 29, Mr. Grover made an off-hand comment about Mr. Nalan, but that Mr. Grover qualified the statement even as he made it. Despite Mr. Grover's casual delivery of the remark, Ms. Meyer-Allbee seems to have concluded, then and there, that Mr. Nalan was guilty of dishonesty and misconduct. The fact that Mr. Nalan did in fact call in sick on December 29 appears to have solidified the employer's notion that Mr. Nalan was guilty of dishonesty and misconduct. The fact that Ms. Meyer-Allbee saw Mr. Nalan at his place of business the evening of December 30, and that he did not appear to her to be ill, appears to have thoroughly convinced Ms. Meyer-Allbee that Mr. Nalan had engaged in dishonesty and misconduct.

The reasoning that led the employer to conclude that Mr. Nalan had lied about being ill so that he could work on his business was faulty. This type of reasoning is so widely recognized as being faulty that it has its own Latin name: *post hoc ergo propter hoc*. The fact that Mr. Nalan called in sick after he made an off-hand remark to Mr. Grove the night before does not prove that the two events had a cause-effect relationship or were otherwise related. Likewise, the fact that Mr. Nalan responded to the immediate and pressing needs of his business on the evenings of December 29 and 30, fails to prove that he was not in fact ill on those days. The administrative law judge is in no better position to draw such a conclusion than Ms. Meyer-Allbee was during her brief conversation with Mr. Nalan through the glass door of the restaurant. During the hearing, the employer appeared to want to shift the burden of proof to Mr. Nalan and require him to prove that he had in fact been sick on December 29-30. However, because the employer discharged Mr. Nalan, the law requires the employer to prove that Mr. Nalan engaged in misconduct. See Iowa Code section 96.6(2). In the end, the record establishes uncorroborated allegations of dishonest and misconduct, not proof. See 871 IAC 24.32(9).

Based on careful review of the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nalan was discharged for no disqualifying reason. Accordingly, Mr. Nalan is eligible for benefits, provided he meets all other eligibility requirements.

**DECISION:**

The Agency representative's decision dated January 28, 2005, reference 02, is affirmed. The claimant was discharged from his employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/kjf