BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CHAD R CUPPS

Claimant,

and

WS LIVE LLC

Employer.

HEARING NUMBER: 09B-UI-08319

EMPLOYMENT APPEAL BOARD
DECISION

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Employment Appeal Board would adopt and incorporate as its own the administrative law judge's Findings of Fact with the following addition:

Mr. Cupps had ongoing attendance issues that triggered the second written warning he received on April 17th.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

871 IAC 24.32(7) provides:

> *Excessive unexcused absenteeism*. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall

be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

It is important to point out that while the claimant had what could be considered extenuating circumstances, it is difficult to fathom that he had no means to contact the employer while he was hospitalized. Mr. Cupps, a short-term employee, admitted having knowledge of the employer's no call/no show policy. (Tr. 6) And if he didn't know at the start of his employment via the orientation (Tr. 3), he should have known given the two written warnings he received on April 17th regarding his April 3rd failure to call in or report to work and other attendance concerns for which he signed in acknowledgement of receipt. (Tr. 4, lines 33-34; Tr. 5, lines 1-5)

Mr. Cupps knew that his job would be in jeopardy if he accumulated three no call/no shows in a 12-month period (Tr. 5); thus, it was incumbent upon him to take more stringent measures to contact the employer in order to secure his employment. His excuse that the hospital wouldn't allow for long-distance calls falls short given he could have requested some type of assistance from hospital personnel, i.e., e-mail or mailing a letter to the employer. His failure to contact the employer was tantamount to a blatant disregard for the employer's interests. The fact that he failed to call in for more than three days renders all these absences to be not only excessive, but unexcused as well. It would not be reasonable for the claimant to expect the employer to hold open his position after not hearing from him for over a week's time. Had the claimant contacted the employer immediately upon his release and presented a doctor's excuse, this case may have had a different outcome. But, considering these facts, we conclude that the employer has satisfied its burden of proving disqualifying misconduct.

DECISION:

The administrative law judge's decision dated June 26, 2009 is **REVERSED**. The claimant was discharged for disqualifying misconduct. Accordingly, he is denied until such time he has worked in and has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. See, Iowa Code section 96.5(2)"a".

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/fnv

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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John A. Peno

AMG/fnv