

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

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**JEFFREY R PHILLIPS**

Claimant,

and

**GENESIS HEALTH SYSTEM**

Employer.

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**HEARING NUMBER: 14B-UI-00319**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**NOTICE**

**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**

**DECISION**

**UNEMPLOYMENT BENEFITS ARE DENIED**

The Employer appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board 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 adopts and incorporates as its own the administrative law judge's Findings of Fact with the following modifications:

On May 5, 2012, Mr. Phillips signed an acknowledgment form that he read and received the personnel handbook, which contained the Employer's policies regarding workplace conduct, specifically, 'Workplace Violence'. (Tr. 15-16, 18, 27, Ex. 5, p.2, Ex. 6) That policy, specifically, sets forth:

Zero Tolerance: Violence or threats or violence in any form, even if intended as "horse play" or "joking," will be viewed as constituting an intent to do harm...

...Genesis prohibits and will not tolerate employee conduct that is...intimidating, or threatening, including threats of violence ...at or away from the workplace...

Any employee found in violation of this policy *will be subject to corrective action including immediate termination on the first offense...*(Emphasis added.)

On August 20, 2013, Mr. Phillips was upset about being short-staffed in the pharmacy. He became 'belligerent' and started complaining about poor working conditions adding that the 'staff should revolt' in the presence of three other pharmacy staff personnel. (Tr. 11-12, 25)

The Claimant previously voiced complaints about the way upper management ran Genesis; however, according to the pharmacy technician who reported the incident, this time Mr. Phillips expressed violence in his complaint. (Tr. 12) In a prior incident on July 14, 2013, the Claimant believed another employee had left work for him, and when the third shift pharmacist tried to explain the situation, Mr. Phillips became upset using profanity. (Tr. 13-14) When questioned about that incident, Mr. Phillips indicated that he had started a new medication. (Tr. 14) He also indicated that he was having a rough day, i.e., prior to reporting to his shift, he waited for his very sick mother to be taken by ambulance to emergency with signs of cardiac arrest. (Tr. 28-29)

The Claimant had already received a first 'coaching and counseling' back on February 8, 2013 for having numerous tardies. (Tr. 15, Ex. 3). He received a second 'coaching and counseling' for 'disruptive/abusive/threatening behavior' on July 9, 2013. The Employer issued a second warning on July 18, 2013 for his use of profanity on the 14th. (Tr. Ex. 2) Out of concern for the Employer's safety and its employees, the Employer contacted Mr. Phillips by phone the following day to terminate him for violating the Employer's zero tolerance policy against violence. (Tr. 20, 24, Ex. 1)

## **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code Section 96.5(2)(a) (2013) 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).

It is clear from this record that the Claimant was progressively disciplined; initially, for attendance issues, and secondarily for behavior concerns. The Employer has a zero tolerance policy regarding violence in the workplace under any form for which Mr. Phillips had knowledge of this policy based on his initial orientation (Tr. 18), his signature in acknowledgement of receipt of the handbook (Tr. 16, Ex. 6), and his own admission during the hearing. (Tr. 27) His denial of having knowledge of any prior warnings (Tr. 22) does not diminish the fact that he knew his remarks, i.e., "he should show up at the CEO's house with and an AK47" and suggestion that he should "burn down the CEO's house," on August 20, 2013 were in violation of the Employer's zero tolerance policy. Any reasonable person would construe such talk as threats of violence. The Claimant had already exhibited a serious lack of decorum when he 'lost it' and used profanity towards his superior when he thought he had to do someone else's work. (Tr. 13-14, Ex. 2) The court in *Deever v. Hawkeye Window Cleaning, Inc.*, 447 N. W. 2d 418 (Iowa App. 1989) held that a single instance of vulgar language can be disqualifying if it serves to undermine the employer's authority. In addition, the *Deever* court also held that threats to a supervisor are disqualifying misconduct.

Mr. Phillips, himself, admitted making the violent remarks in which he also acknowledged that "...they were terrible and frightening things... I have no doubt that it frightened Angela... I would have reported it myself if I'd heard myself saying them..." (Tr. 25-26) His defense that he made his threats 'in jest' or that he was using 'black humor' have no merit. The Employer's policy had no tolerance for such "joking." (See, Ex. 5, p. 2)

While we can sympathize with his personal plight on the 20<sup>th</sup> (his mother's emergency hospitalization and his own medical issues), we cannot condone his behavior in any way. The Employer has a right to expect a certain level of civility from its staff. Certainly, the Claimant's behavior in his recent past (July 14<sup>th</sup>) coupled with this final act appear to be an escalation of his mounting frustration, be it over the short-staffing issue, or personal medical issues. Be that as it may, his behavior has culminated into serious threatening comments in the workplace against the CEO, which any Employer would be remiss to take lightly. Given the Employer's zero tolerance policy of which the Claimant had full knowledge, we can only characterize Mr. Phillips' threats as behavior that fits squarely within that policy, and subject to immediate termination "...on the first offense." (Ex. 5, p. 2) Based on this record, we conclude that the Employer satisfied their burden of proof.

**DECISION:**

The administrative law judge's decision dated February 10, 2014 is **REVERSED**. The Employment Appeal Board concludes that the claimant committed disqualifying misconduct. Accordingly, he is denied benefits 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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Monique F. Kuester

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Cloyd (Robby) Robinson

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