

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHEN W DOCKENDORFF
Claimant

APPEAL NO: 11A-UI-15013-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CURE BUSINESS SOLUTIONS INC
Employer

**OC: 10/23/11
Claimant: Appellant (4)**

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
871 IAC 24.32(8) – Current Act
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant appealed a department decision dated November 10, 2011, reference 01, that held he was discharged for misconduct on October 21, 2011, and benefits are denied. A telephone hearing was held on December 14, 2011. The claimant, and Attorney, Steve Ort, participated. Sam Boyer, President, and Stacy Gengenbacher, Office Manager, participated for the employer.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on December 21, 2009, and last worked for the employer as a full-time PC/Network Technician on October 21, 2011. Although the employer re-organized the corporate entity from an LLC to a corporation effective January 2011, he worked for the same business throughout his employment.

The employer discharged claimant on October 21, 2011 knowing that he had a disability due to migraine headaches for which he had provided medical documentation. The company president made the decision to discharge on October 13, but waited to announce it to claimant pending attorney review. During the last five weeks of employment, he averaged 15-hours for a 40-hour work week. He missed work mostly due to his disability. He was scheduled to work from 7:00 a.m. to 6:00 p.m. with a three-hour lunch break to be taken at his discretion.

The employer did not offer as evidence any written documentation that claimant was issued discipline for any discharge reason. The employer did not offer as evidence any written policy that applied to any discharge reason, but it does have a disciplinary policy.

Claimant acknowledges a written reprimand in August 2011 for excessive browsing of the internet during work hours, but denies any further discipline or use. Claimant recalls being told not to clock-out on the internet from a remote locate. He did fail to call-in and report for work on September 19/20 and October 7, 2011. His failure was due to medication drowsiness based on his disability. The employer did verbally warn claimant about these issues.

The employer noted claimant had given a published reference on the internet for a former employee who started a competing business by stating the owner was one of the best technicians he knew. The employer considered this as a violation of its conflict of interest policy, and a reason for discharge

The Social Security Administration issued claimant a disability award letter in October 2011 based on migraine headaches. His monthly disability benefit of \$1,172.00 began October 25. It is his understanding he is limited to working 32 hours a week, but he could not offer whether he was limited to a certain level of work earnings. He believes his current medication is controlling his disability to the point he could accept full-time employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(7) provides:

(7) 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.

The administrative law judge concludes the employer has failed to establish claimant was discharged for misconduct and/or a current act of misconduct in connection with employment on October 21, 2011.

The evidentiary record is clear that the employer never issued a written warning that claimant's job was in jeopardy for any reason it offered in this hearing. The employer failed to offer evidence of any written policy claimant violated and/or any record of written discipline though it has a policy that provides for it.

The employer knew claimant had a disability that explains him working an average of 15-hours a week during his last five weeks of employment, and his failure to notify the employer of absences from work. Claimant's absenteeism though excessive was for an excusable reason, and is not misconduct. After the employer verbal warning on the call-in issue, there was no further occurrence after October 7.

While the claimant had received a written reprimand about personal internet browsing in August, there was no further discipline until his October 21 discharge. The claimant explained his at work employer internet use on October 10 & 13 when he clocked-in early. The claimant had been given some latitude in his work schedule especially in light of his work and disability. Although the employer knew it was going to discharge claimant on October 13, it allowed continuing employment until October 21. The time lag suggests claimant's conduct was not so serious that the employer could wait on announcing the decision while claimant continued to perform work.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge further concludes the claimant is not able and available for full-time employment effective October 23, 2011 due to disability. The claimant waived notice on this hearing issue.

The fact that claimant averaged a 15-hour work week during the last five weeks of employment leading up to the filing of his claim is the best evidence he is not able to work a full-time job given his disability. Social Security does not issue partial disability awards, and it limits the amount of earnings that a person can receive in order to receive the monthly disability benefit. While claimant could work a part-time job or have limited self-employment earnings, he is restricted from full-time employment due to the excessive earnings limitation.

Claimant has the right to appeal this issue, but he also has the right to seek a new department fact-finding where he can offer evidence that he is not medically restricted from working full-time or self-employment and the law provisions of his disability that would allow to him have earnings from full-time employment or self-employment that would not jeopardize his benefit award.

DECISION:

The department decision dated November 10, 2011, reference 01, is modified. The claimant was not discharged for misconduct on October 21, 2011, and no benefit disqualification is imposed for this reason. The claimant is not eligible for benefits, because he is not able and available for work effective October 23, 2011.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs