

At approximately 10:55 a.m. the administrative law judge was notified by a staff person that the claimant was waiting in the reception area at 1000 E. Grand for his hearing. The administrative law judge went out and met the claimant and informed him that the hearing was to be by telephone. The claimant stated that he had misunderstood the notice. The claimant had a cell phone with him. The administrative law judge called that cell phone number and the claimant participated in the hearing. The claimant remained in the reception area and did not come back to the offices of the Appeals Section. Neither party requested an in-person hearing. The claimant participated in the entire hearing by telephone.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time security officer from March 15, 2005 until he was discharged on September 27, 2005. The claimant was discharged because of two complaints received by the employer from one of its clients, Hy-Vee. Employees of Hy-Vee made two complaints about the claimant. The first was that the claimant was walking down the hallway and met a female employee and turned his face into the wall and put his nose against the wall. The second complaint was that the claimant believed that an employee was looking at him and remarked to the employee, or asked the employee, if the claimant should have an epileptic seizure to provide the employee with entertainment. When the employer received these two complaints it discharged the claimant. The claimant has epilepsy and the employer was aware of the claimant's condition. The claimant had a couple of seizures while employed by the employer but they did not seem to interfere with his work. The employer has a policy as shown at Employer's Exhibit 1 prohibiting discourteous treatment of any kind to fellow employees, members of the public, or the client. The claimant received a copy of this policy, signed in acknowledgement therefore, and was aware of the policy. The claimant had been placed at other accounts and had no complaints filed against him from those accounts. The claimant had received no relevant warnings or disciplines.

Pursuant to his claim for unemployment insurance benefits filed effective September 25, 2005, the claimant has received unemployment insurance benefits in the amount of \$628.00 as follows: \$230.00 for benefit week ending October 1, 2005 (earning \$60.00); \$232.00 for benefit week ending October 8, 2005; and \$166.00 for benefit week ending October 15, 2005 (earnings \$124.00).

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 27, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses credibly testified that the employer received two complaints about the claimant from one of its clients. One complaint was that the claimant was walking down the hallway and met a female employee and turned his face into the wall and placed his nose against the wall. The other complaint was that the claimant believed an employee was looking at him and the claimant remarked to that employee, or asked that employee, if the claimant should have an epileptic seizure to provide the employee entertainment. The claimant did not deny these incidents but testified credibly that he did not recall the incidents. The evidence establishes that the claimant has epilepsy and that the employer was fully aware of his epileptic condition. In fact, the employer conceded that the claimant had had several seizures while at work but these seizures did not seem to interfere with his employment. The claimant testified that he could not recall either incident, but if they occurred it was because of complications with his epilepsy.

Although the employer's testimony was hearsay evidence of the two incidents, the administrative law judge must conclude on the record here that the two incidents occurred in

somewhat the way as testified to by the employer's witnesses. The two incidents certainly demonstrate strange behavior on the part of the claimant. However, there is not a preponderance of the evidence that this behavior was not attributable in some way to the claimant's epileptic condition. Accordingly, the administrative law judge cannot conclude that these incidents were not due to the claimant's epilepsy. Therefore, the administrative law judge is constrained to conclude that these incidents were neither deliberate acts or willful acts so as to establish disqualifying misconduct for those reasons. At most they are carelessness or negligence. The issue then becomes whether these acts were careless or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that they are not recurring carelessness or negligence. There is no evidence that the claimant received any warnings or disciplines for such similar behavior. There is also evidence that the claimant was assigned to other accounts and no complaints were made by those accounts. There is evidence that the employer was aware of the claimant's epileptic condition and, in fact, the claimant had several seizures while at work. On the record here, the administrative law judge concludes that the claimant's acts were not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct but were, at most, ordinary negligence in isolated instances or failure in good performance as a result of inability or incapacity, and not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge is constrained to conclude here that there is insufficient evidence of substantial misconduct on the part of the claimant that was willful or deliberate or reoccurring negligence, so as to warrant disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$628.00 since separating from the employer herein on or about September 27, 2005 and filing for such benefits effective September 25, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of October 14, 2005, reference 01, is affirmed. The claimant, Daniel J. Enders, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

dj/kjw