

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NWINMENE G ZARAKPEGE
Claimant

APPEAL NO: 11A-UI-05654-DW

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOSAIC
Employer

OC: 03/06/11
Claimant: Appellant (2)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's April 20, 2011 determination (reference 01) that disqualified him from receiving benefits and held the employer's account exempt from charge because he had had been discharged for disqualifying reasons. The claimant participated in the hearing with his attorney, Justin Gross. David Williams, a TALX representative, appeared on the employer's behalf. Jen Zajicek, the associate director, Trina Emmert, a direct support manager, Brandi Bretthauer, Nancy Seel and Patty McCain, the claimant's supervisor, appeared at the hearing on the employer's behalf. During the hearing, Employer Exhibits One through Five, and Claimant Exhibit A were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concluded the claimant is qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in August 2008. The claimant worked full time as a direct support associate on the afternoon shift.

July 19 through 24, 2010, the employer suspended the claimant for allegedly behaving inappropriately with a client. Later this was determined to be unfounded, but the employer told the claimant he was not to talk to other co-workers about this incident. (Employer Exhibit Five.) The employer gave the claimant a written warning on February 23, 2011, for talking to a co-worker about the July 2010 incident. The employer told him in July not to talk about the incident. When the claimant talked to a co-worker that was involved in the incident, the co-worker perceived the claimant as being intimidating. (Employer Exhibit Five.)

On February 28, the employer suspended the claimant after a co-worker reported he threatened her by throwing a television remote control at her. The claimant acknowledged he tossed the remote control in the co-worker's direction, but had not threatened her. He had not been upset

with her when he tossed the remote control to her and had not intended this as a threatening gesture. (Employer Exhibit Four.)

On March 4, 2011, the employer gave the claimant a written warning for making unprofessional comments about his job and for failing to complete all job duties and activities he had been assigned to do with a client. Zajicek told the claimant that if he again failed to follow activities that were scheduled or did not follow any other policy, he could be terminated. After the claimant received this written warning, he understood his job was in jeopardy.

On March 4, McCain talked about the activities assigned to residents that weekend and went over the activities schedule with the claimant so he knew what the employer expected from him over the weekend. She talked to the claimant about taking CP out on Sunday when he worked. McCain reminded the claimant to follow the activity schedule. The activity schedule lists the staff person assigned to take a resident on an activity. The activity schedule can be changed, but the change must be authorized by a supervisor.

On March 6, the claimant was assigned to take CP on an activity. When Emmert came to the facility that afternoon, the claimant's co-worker did not know where the claimant was. The activity schedule did not indicate M.W. was to be taken on an activity, but M.W. was not at the facility and C.P. was. The employer assumed the claimant had taken M.W. on an activity, but did not know where they were. Since M.W. was not scheduled to go on an activity, Emmert contacted Bretthauer to find out what should be done. When the claimant returned from taking M.W. on an outing, he was asked to go home early. He had enough time before his shift ended to take C.P. on an activity, but the employer did not allow this.

On March 7, the employer discharged the claimant because the claimant took M.W. on an activity when M.W. was not scheduled for an activity on the activity sheet and the claimant did not request permission to take M.W. on an activity. The claimant had not requested authorization to change the activity schedule because he had not looked at the activity schedule on March 6. The claimant had taken M.W. out on activities previous Sundays and assumed he was scheduled on March 6 also. The claimant had taken C.P. on an activity on Saturday and assumed he was not assigned to go out again on Sunday.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. 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 willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence

or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

After the claimant received the March 4 written warning, he knew or should have known his job was in jeopardy. McCain talked to him about the activities scheduled for residents that weekend because she wanted to make sure the claimant understood all his assignments so there would not be a problem. On Sunday, March 6, the claimant did not check the activity schedule. He assumed he was scheduled to take M.W. on an activity as he usually did on Sunday. The claimant took M.W. out on an activity, but M.W. was not scheduled for an activity that Sunday with the claimant. C.P. was scheduled to be taken out for an activity by the claimant at a certain time.

Since the claimant had just been warned on Friday that his job was in jeopardy if he failed to follow the employer's policies and procedures and McCain talked to him about the activity schedule for the weekend on March 4, the claimant was put on notice that he needed to make sure he performed all his jobs correctly. His failure to review the activity sheet before he took out M.W. amounts to negligence. There is no evidence a problem like this had happened before. The claimant's testimony that he usually took M.W. on an activity on Sunday is credible. Given the fact the claimant knew his job was in jeopardy, the facts do not establish that he intentionally failed to follow the activity sheet.

The employer established justifiable business reasons for discharging the claimant. The facts do not, however, establish that the claimant intentionally failed to follow the employer's instructions and procedures or was so negligent that he committed work-connected misconduct. As of March 6, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements.

DECISION:

The representative's April 20, 2011 determination (reference 01) is reversed. The employer discharged the claimant for justifiable business reasons, but the claimant did not commit work-connected misconduct. As of March 6, 2011, the claimant is qualified to receive benefits, provided he meets all other eligibility requirements. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs