**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**THOMAS P RYAN**
Claimant

**HY-VEE INC**
Employer

**APPEAL NO: 09A-UI-02649-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 01/18/09**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Hy-Vee, Inc. (employer)) appealed a representative's February 11, 2009 decision (reference 01) that concluded Thomas P. Ryan (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 16, 2009. The claimant participated in the hearing. Barbara Frazier-Lehl of Unemployment Insurance Services appeared on the employer's behalf and presented testimony from two witnesses, Adam Krepela and Misty Frentress. During the hearing, Employer's Exhibits One, Three, Four, Five, and Six were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on September 9, 2004. He worked full time as a staff pharmacist in the employer's Le Mars, Iowa store. His last day of work was January 9, 2009. The employer discharged him on that date. The reason asserted for the discharge was making too many dispensing errors.

The pharmacies of two of the employer's Le Mars locations were combined sometime in approximately 2007. There is no record of there being any issues with the claimant having an excessive error rate prior to the combination of the pharmacies. On May 18, 2008, however, the claimant received a formal discipline indicating in part that he had 16 errors over the past several months, and that if the errors continued and the claimant did not improve on following safety procedures that he would be suspended or discharged.

After May 18 the claimant did have occasional dispensing errors and the employer did write up a number of incident reports. On January 7, 2009 a state pharmacy inspector came to the store. The inspector informed the employer that a doctor had made a complaint to the

pharmacy board back in October 2008 that on October 15 the claimant had filled a prescription for the narcotic hydrocodone two weeks early despite the doctor's instruction that the prescription not be filled early. From the employer's records it appeared that another pharmacist in the employer's pharmacy had also filled the prescription early without obtaining the doctor's permission. The pharmacy inspector also followed up on a customer complaint that on September 8, 2008 the claimant had dispensed a water pill rather than a pain medication. The employer had not been previously aware of the October 15 dispensing issue, but had been previously aware of the September 8 dispensing error.

As a result of the pharmacy inspector's visit the employer compiled a listing of the reported dispensing errors by the claimant since the May 18 warning and found that there had been ten including the September 8 error but not including the October 15 early dispensing error. The most recent error prior to January 9 was December 20, 2008 when the claimant dispensed a cancer treatment medication rather than an anti-psychotic medication. The claimant's primary explanation for the errors was that in the combined pharmacy operation the work was more hectic and less organized so that it was more difficult to double check the initial work on prescriptions done by the pharmacy technicians.

**REASONING AND CONCLUSIONS OF LAW:**

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the number of dispensing errors he made or was responsible for as the final checking pharmacist. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not

misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to attempt to perform his duties within the revised pharmacy operation to the best of his abilities. Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The most recent incident in question occurred over three weeks prior to the employer's discharge of the claimant. While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

**DECISION:**

The representative's February 11, 2009 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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