IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEVIN G NIDAY
Claimant

VERMEER MANUFACTURING COMPANY INC
Employer

APPEAL NO: 12A-UI-04397-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/25/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Vermeer Manufacturing Company, Inc. (employer) appealed a representative's April 16, 2012 decision (reference 01) that concluded Devin G. Niday (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 May 29, 2012. The claimant participated in the hearing. Laura Briggs appeared on the employer's behalf and presented testimony from four witnesses, Becky Fowler, Bob Evans, Lois Slings, and Jim Kennedy. 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?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on November 7, 2005. Since March 2008 he worked full time as a technical illustrator. His last day of work was March 22, 2012. The employer suspended him on March 22 and discharged him on March 27, 2012. The reason asserted for the discharge was the employer's concern that the claimant's time report on March 19 could not be verified and might have been falsified.

On March 19 the employer had a report from at least one of the claimant's coworkers that he had been gone all that afternoon; the claimant had not returned to his desk to clock out, but had called the administrative assistant at about 3:45 p.m. and has asked her to clock him out. The employer considered the claimant's time from 1:30 p.m. to 3:45 p.m. to be unaccounted for. The claimant was absent due to illness on March 20 and March 21. When he returned on

March 22, he was questioned by the employer as to his whereabouts on the afternoon of March 19. He indicated that on March 19 he knew he had gone from his building to a nearby building to speak to two design engineers and that he had a phone conference with Slings, a risk manager; he also indicated that he had seen the administrative assistant and gone to the on-site pharmacy to pick up a prescription.

However, the two design engineers were not in the office that day, and Slings indicated the phone discussion she had with the claimant that day had been in the morning, not in the afternoon. When the employer concluded that the claimant had lied about these contacts, it assumed that the claimant had actually not been on the premises for the entire time between 1:30 p.m. and 3:45 p.m. The claimant acknowledged that he had been in error in his recollection as to when during the day he had spoken to Slings, but indicated that while he had told the employer he had gone to speak to the two engineers, he indicated that he had not said he had actually spoken with the two engineers that day, but had only indicated that the reason he had gone to the other building was to speak to them, where he found that they were gone for the day, so he did other things in the building instead.

The employer verified with the administrative assistant that she had seen and spoken to the claimant "between 1:30 p.m. and 2:30 p.m."; the employer chose to rely on the earlier of the two times rather than the later. The claimant indicated that he had been at the on-site pharmacy between 2:30 p.m. and 3:00 p.m.; the employer did not ask the claimant if he could produce his sales receipt from the pharmacy which might have verified the time of his visit to the pharmacy, nor did the employer ask the claimant if he was willing to waive his privacy rights so that the employer could inquire of the pharmacy about the claimant's visit that day.

The claimant acknowledged that he did not return to his desk and clock out himself when he left the other building. Rather, as the claimant's normally end time was 2:30 p.m., when he left the other building, rather than returning to his own building to clock out, he went to his car and left, calling the administrative assistant as he left so he would be clocked out. Because the employer did not verify the claimant's actual presence on the premises until 3:45 p.m. and suspected he was off the premises during time he was still "on the clock," the employer discharged the claimant.

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 belief he was off the premises while he was on the clock for a portion of the afternoon of March 19. It is the employer's burden to establish by a preponderance of the evidence that misconduct in fact occurred – that the evidence shows that it is "more likely than not" that the alleged activity occurred. A mere belief that the activity "could have occurred" is not sufficient; a mere allegation of misconduct without corroboration is not sufficient to result in disqualification. 871 IAC 24.32(9). The employer has not established that the claimant was more likely than not away from the premises during the time in question; it did not even take all reasonable steps available to it which might have verified the claimant's consistently maintained assertion that he was on the premises during the entire time in question, even if he was away from his regular building and over at another building. The employer 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 April 16, 2012 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

ld/pjs