

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARK LENNON
Claimant

APPEAL NO: 11A-UI-11404-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

APRIA HEALTHCARE INC
Employer

**OC: 07/31/11
Claimant: Appellant (2)**

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Mark Lennon (claimant) appealed an unemployment insurance decision dated August 25, 2011, reference 01, which held that he was not eligible for unemployment insurance benefits because he was discharged from Apria Healthcare, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 22, 2011. The claimant participated in the hearing. The employer elected not to participate. Claimant's Exhibit A was admitted into evidence. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time senior sales representative from November 29, 2010 through August 3, 2011. He was discharged for changing the durable medical equipment provider information on a physician's order for a home sleep test. This was done on July 15, 2011 the claimant had a breakfast meeting with healthcare providers in the Family Medicine Clinic in Onawa, Iowa. The claimant was educating these providers about home sleep studies and he met with Physician's Assistant Kevin Kollbaum who told the claimant he had just ordered a sleep test through the claimant's company.

Shortly after that, PA Kollbaum's nurse, Chris, showed him a physician's order for a home sleep study through Instant Diagnostic Systems (IDS) and asked the claimant if he knew why it had been kicked back. The form had a box indicating "Need DME Info"; there was a reference number listed but no other information. The claimant explained that there were several providers who worked through IDS and this was not one of theirs; he further explained that the reference number should have been sufficient and he was unsure why it was kicked back. Chris asked him if he could put his information on the form to avoid further delays and get the

order processed for the patient. The claimant agreed and provided the employer's name and address, the employer's reference number, his name and telephone number on the form.

The claimant did not interfere with the physician's order and there was no benefit to him personally by doing this. In fact, the patient may or may not have subsequently chosen the claimant's employer to provide its durable medical equipment. Simply because an equipment provider's name is on the form does not obligate the patient to go through that particular company. The claimant heard nothing more about this until August 2, 2011 when he was called to meet with the employer in its Council Bluffs, Iowa office and he was asked to surrender his computer and Blackberry as his job was terminated.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and failed to provide any evidence. The evidence provided by the claimant does not rise to the level of job misconduct as that term is defined in the above stated Administrative Rule. The employer failed to meet its burden. Work-connected misconduct has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated August 25, 2011, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/css