IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RANDY D PITZER
Claimant

LENNOX MFG INC
Employer

APPEAL NO: 06A-UI-08755-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07-23-06 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 18, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 18, 2006. The claimant did participate. The employer did participate through Dick Tesar, Human Resources Coordinator.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a fabricator full-time beginning August 9, 1999 through July 19, 2006 when he was discharged. The claimant was discharged for allegedly abusing FMLA leave. The claimant has a standing FMLA order from his treating physician due to a migraine and seizure disorder. The employer was unable to provide a specific date that the claimant allegedly abused his FMLA leave, but believes it may have been July 15 or July 16. On July 15, a Saturday, the claimant properly reported his absence due to migraine seizure disorder under his standing FMLA. That evening the claimant went to the Backstage Lounge where he ate dinner and drank a Pepsi. The claimant denies consuming any alcohol and contends he was in the lounge only for approximately one-half hour. The employer contends that two coworkers saw the claimant in the lounge on a date he had called in sick to work. The employer was not sure if the claimant had been drinking alcohol or not while observed at the lounge.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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 employer discharged the claimant and has the burden of proof to show misconduct. 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).

The claimant did call in sick to use FMLA on Saturday July 15, which could have been a work day for him. The employer and the claimant can only agree that the claimant was at a lounge when he called in sick to work. While it is puzzling that the claimant would choose to eat at a bar during a sick day, there is no requirement that a claimant who calls in sick remain a prisoner in their home. The employer cannot establish by the claimant's mere presence in a bar on July 15 that he was abusing his FMLA leave. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner he knew to be contrary to the

employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

DECISION:

The August 18, 2006, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/cs