

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

IAN C TEIG

Claimant,

and

HILLCREST FAMILY SERVICES

Employer.

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HEARING NUMBER: 10B-UI-03415

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A, 96.5-1

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Ian C. Teig, worked for Hillcrest Family Services from September 10, 2007 through February 8, 2010 as a full-time visiting counselor. (Tr. 4-5, 14-15) As a visiting counselor, the claimant was responsible for completing paperwork after each visit as well as quarterly reports. This paperwork was necessary so that the employer could substantiate the documentation in order to get reimbursed for services. (Tr. 6)

Mr. Teig had difficulty keeping up with his paperwork. (Tr. 10-11, 20) Towards the end of 2008, and throughout 2009, he missed much work due to illness. (Tr. 19) On October 20, 2009, the employer did a performance evaluation on the claimant. (Tr. 12, Employer's Exhibit 3) The following week (October 27, 2009), the employer issued a Correction Action and placed him on probation. (Tr. 11, 13) He was not allowed to see clients until he got caught up with his paperwork. (Tr.10-11) By the end of

November

of 2009 into early January of 2010, the employer noticed the claimant having a major depressive episode based on his many absences, failure to see clients, inter alia. (Tr. 8, 12, 21, 25) Mr. Long requested FMLA leave to begin January 4th and extend through February 2, 2010, which was granted. (Tr. 8, Employer's Exhibit 5)

The claimant sought medical attention at Mayo Clinic on January 5, 2010 from which his attending doctor prescribed Adderall, which significantly affected his sleep pattern (inconsistent sleep). (Tr. 22-23)

On January 13, 2010, the claimant presented the employer with a note from his psychiatrist indicating that he had major depressive disorder and ADHD that may require occasional short-term absences. (Tr. 7-8, Employer's Exhibit 8) Mr. Long had long ago (February 2003) been diagnosed with these disabilities and it was unpredictable at the time to determine how his life would be affected. (Tr. 8, Claimant's Exhibit 3)

When Long's medical leave ended, he did not return to work as scheduled on February 4th or 5th (Tr. 5, 18-19, 28) even though he had been released to return with no restrictions. (Employer's Exhibit 5) The claimant's medication caused him to sleep very deeply, which resulted in his oversleeping. (Employer's Exhibit 7) He maintained contact with the employer via e-mails regarding his predicament. (Tr. 18-19, 21, 22-23, Employer's Exhibit 7, Claimant's Exhibit 6) Mr. Long adjusted his medications and was able to return to work on a full-time basis. (Tr. 16-17) When he reported to work on February 8th, the employer informed that if he could complete his notes, he would be allowed on-call status (Tr. 29, 32), and [if he could maintain] "...six to eight months of stability that [eh] could be rehire[d] but for no specific position..." (Tr. 24, 31) He was also told he needed a full medical release to return. (Tr. 27-28)

Believing he'd been terminated, Mr. Long filed for unemployment benefits, effective February 7, 2010, for which he was granted. He continues to seek full-time work.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the

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 Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record is clear that Mr. Long sporadically suffered from a well-documented case of major depressive disorder and ADHD, which had been communicated to the employer. The claimant had been on a medical leave of absence and missed considerable amount of work that affected his ability to stay current with case notes. Thus, his failure to keep up with his work was not due to any intentional misbehavior on his behalf. Mr. Long's return to work to offer his services on February 8th is indicative of his intention to maintain his employment. The employer's offering him a position less than the full-time employment with benefits that he had previously enjoyed, and conditioned upon his completion of past paperwork and at on-call status was tantamount to a discharge. Of course, the claimant (as any reasonable person would have done) turned down such an offer. We can reasonably infer that his acceptance of anything less than full-time status would mean a loss of health benefits that would have negatively impacted the claimant's health, particularly in light of his most recent medical issues. The claimant was able and available to complete his paperwork provided he could maintain his full-time employment, which obviously was not an option. Because the employer would not allow Mr. Teig to return without a full medical release, we must characterize this as a separation initiated by the employer.

871 IAC 24.1(113)"c" provides:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

The claimant's refusal of what appears to be an unsuitable offer is not misconduct by any stretch of its legal definition. 871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established...

Based on this record, we conclude that the employer's failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated May 5, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

AMG/fnv

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv