

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID D MALM
Claimant

APPEAL NO. 10A-UI-14612-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

LIEBE CARE CENTER INC
Employer

OC: 09/12/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or Disciplinary Layoff

STATEMENT OF THE CASE:

Liebe Care Center, Inc. (employer) appealed a representative's October 14, 2010 decision (reference 01) that concluded David D Malm (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 8, 2010. The claimant participated in the hearing. Betty Bill appeared on the employer's behalf and presented testimony from one other witness, Terra Hillegas. 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 or suspended for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 18, 2009. He worked part-time (up to 24 hours per week) as a second shift RN/charge nurse in the employer's skilled and intermediate care nursing facility. His last day of work was February 21, 2010. He was suspended on that date; the employer never recalled him to work after that suspension and considered his employment ended.

The initial reason the employer suspended the claimant was that he, as well as some other employees, were suspected of being responsible for some missing medications. The claimant denied responsibility for the missing medications. The employer did not have any direct information indicating that he was responsible, only that he was one of only a few employees who had access to the medications. The employer contacted law enforcement regarding the missing medications, but as of the date of the hearing, there had been no resolution of the criminal investigation, and no criminal charges relating to those missing medications had been filed against the claimant.

On February 22, after the employer had already informed the claimant of his suspension, the employer observed that it appeared that the claimant was recording the conversation, which the employer felt was a HIPPA violation. The employer then summoned law enforcement personnel, who then arrived and escorted the claimant from the premises. By the time law enforcement personnel arrived, there was nothing on the claimant's recording device. During the time the parties were waiting for law enforcement to arrive, the claimant indicated that he had used his recording device to record a prior conversation regarding the care of a particular resident, but that he had subsequently erased that recording.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has suspended or 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 suspended or discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a. For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9).

In order to establish misconduct such as to disqualify an employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that 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 that 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 initially suspending and effectively discharging the claimant is the missing medications. A mere allegation of misconduct without corroboration is not sufficient to result in disqualification. 871 IAC 24.32(9). Having simply a reasonable suspicion that the claimant may have been responsible for the missing medications is not adequate to establish misconduct. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was in fact the person responsible for the missing medications.

The employer also asserts that it was justified in suspending and effectively discharging the claimant because of his recording of protected conversations; however, it is clear that those concerns arose subsequent to the communication of the decision to suspend the claimant and were not the basis of the employer's decision to suspend the claimant; those concerns cannot now be used to establish misconduct. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Further, while the Health Information Privacy and Portability Act (HIPPA)

establishes national standards for maintaining the confidentiality of protected health information which effectively prohibits the release of information without the patient's express written permission, so that unauthorized disclosure of confidential patient information could result an employee's suspension or discharge, the rule does not prohibit the recording or collection of the information, only the unauthorized release of the information. While there may have been potential of unauthorized release had the recordings remained intact and been utilized outside the facility, in fact the claimant did not release or disclose any confidential patient information. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. 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 October 14, 2010 decision (reference 01) is affirmed. The employer suspended and effectively discharged the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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