

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JEFF L LARSEN
702 – 15TH ST SE
MASON CITY IA 50401-6919**

**FRESENIUS MEDICAL CARE
ONE WESTBROOK CORP
WESTCHESTER IL 60154**

**C/o THOMAS AND THORNGREN INC
PO BOX 280100
NASHVILLE TN 37228**

**Appeal Number: 06A-UI-08151-HT
OC: 07/16/06 R: 02
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Fresenius Medical Care (Fresenius), filed an appeal from a decision dated August 7, 2006, reference 01. The decision allowed benefits to the claimant, Jeff Larsen. After due notice was issued, a hearing was held by telephone conference call on August 29, 2006. The claimant participated on his own behalf. The employer participated by Warehouse Supervisor Tina Miler and Bio Med Supervisor Roberta Carlson.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Jeff Larsen was employed by Fresenius from June 3 until July 10, 2006. He was a full-time medical technician in training.

On June 29, 2006, the claimant could not be located by his trainer. After calling several phone numbers, the claimant was finally located at home. He stated he had come to work at the facility but no one had arrived yet, and as a probationary employee he did not have keys. Instead of going to the clinic located in the same building, which was part of the employer's business, and asking to wait there or to use the phone, he went home. He did not try to call again later in the day to find out if anyone had arrived or what he should do, and he had allowed the batteries in his pager to go bad, so he could not be reached by the employer.

When Mr. Larsen submitted his time sheet for the pay period which included June 29, 2006, Warehouse Manager Tina Miller noted he had claimed a full eight hours of work for that day. The matter was referred to Human Resources Manager Bud Feinbaumger, who notified Ms. Miller to send the claimant home and discharge him. The claimant's supervisor, Odell Johnson, was the one who actually informed him he was being fired.

The claimant consulted with Mr. Feinbaumger, who told him why he was being fired. The claimant maintained Mr. Johnson had told him previously that he should put down he had worked 8 hours every day even if he had not. As a trainee, he could work only as many hours as there were people to train him and work he could do. The human resources director and Ms. Miller consulted with Mr. Johnson, who denied that he had given the claimant any such directions and the claimant's discharge was affirmed.

REASONING AND CONCLUSIONS OF LAW:

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

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 to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). This must be done by a preponderance of the evidence. In the present case, the administrative law judge does not find the employer to be any more or less credible than the claimant. Mr. Larsen stated he was not no-call/no-show to work on June 29, 2006, although it is certain he did not make a very diligent and good-faith effort to either wait until someone arrived or to call from an available phone.

As for putting down he had worked a full 8 hours on June 29, 2006, he asserted he had permission from his supervisor to do so. The employer failed to present testimony from Mr. Johnson to rebut this, and only provided hearsay testimony which is not sufficient. The employer has failed to meet the burden of proof by a preponderance of the evidence to establish the claimant was discharged for substantial, job-related misconduct and disqualification may not be imposed.

DECISION:

The representative's decision of August 7, 2006, reference 01, is affirmed. Jeff Larsen is qualified for benefits, provided he is otherwise eligible.

bgh/kjw