IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DONALD W OSTHOFF
Claimant

APRIA HEALTHCARE INC
Employer

APPEAL NO: 08A-UI-04229-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/30/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Donald W. Osthoff (claimant) appealed a representative's April 29, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Apria Healthcare, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 28, 2008. The claimant participated in the hearing and presented testimony from one other witness, Rebecca Segebarath. Cris Scheibe of TALX eXpress appeared on the employer's behalf and presented testimony from two witnesses, Deborah Magedanz and Kent Mayrose. 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 for work-connected misconduct?

FINDINGS OF FACT:

After beginning his employment with the employer on February 27, 2006 in Phoenix, Arizona, the claimant transferred to and began working for the employer in its Davenport, Iowa office on September 25, 2006. He worked full time as branch logistics supervisor in the employer's durable and home medical equipment distribution business. His last day of work was March 31, 2008. The employer discharged him on that date. The reason asserted for the discharge was having hours of service violations, having past unsatisfactory job performance warnings, leaving without notification to the branch manager on March 21, and making statements to another employee about leaving the job.

The claimant was salaried and had no set work hours. He was typically to work by 7:30 a.m., and rarely left before 5:00 p.m., frequently working into the evening. In addition to being responsible for supervising the delivery drivers, the claimant drove a delivery truck himself on virtually a daily basis, and had also become responsible to loading the trucks for their deliveries in the mornings. The employer had given him a corrective action plan on July 10, 2007 for demonstrating less than desired leadership qualities, and gave him another corrective action plan on August 24, 2007 for unsatisfactory job performance. He was informally advised on

January 2, 2008 that he needed to meet a deadline for getting a report to the employer's regional office.

In February 2008 the claimant had worked a great number of additional hours covering deliveries, and on his log reports that were turned in no later than March 15 it was discovered that on several days in February he had exceeded his DOT allowed hours of service. Ms. Magedanz, the branch manager, verbally reprimanded the claimant for this on March 20, advising him that he needed to control his hours as well as the other drivers' hours while accomplishing the necessary deliveries. On that same day a service technician commented to the claimant that he was considering quitting; the claimant responded that if the technician decided to quit he should let the claimant know and they could quit together. On about March 25 the claimant commented to the technician that as things were developing he (the claimant) might be quitting sooner than he had anticipated. The claimant did not attempt to persuade the technician to quit.

On March 21 the claimant had a personal obligation in the late afternoon and so came in earlier than usual, approximately 7:00 a.m. He loaded the trucks and started on his deliveries. He completed his deliveries and returned to the office at approximately 3:00 p.m., and then left. Ms. Magedanz had been looking for the claimant and had wished to speak with him, but she did not communicate that message to the claimant while he was out as the employer's radio communication system was not working well at that time. The claimant was not normally in the practice of checking with Ms. Magedanz before leaving, and believed he had covered his duties for the day.

On March 25 Ms. Magedanz verbally reprimanded the claimant for leaving early on March 21 without her approval. Sometime that day the claimant called Mr. Mayrose, the regional logistics manager, and made complaints about Ms. Magedanz' expectations and alleged unfair treatment of him. Mr. Mayrose visited the Davenport office within the next day but did not find evidence to substantiate the claimant's claim of unfair treatment or expectations. However, speaking with other employees in the office Mr. Mayrose concluded that the claimant was not managing effectively.

After a review of the matter, on March 31 the employer's human resources department advised Ms. Magedanz to proceed with discharging the claimant, which she did.

REASONING AND CONCLUSIONS OF LAW:

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which 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 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. 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 claimant's leaving work on March 21 earlier than he usually did was not insubordination and was not disqualifying misconduct; he had no set hours, and he had completed his known duties for the day. He was not aware that Ms. Magedanz wished to discuss other duties for the day with him. The making of the complaint against his branch manager was not misconduct. He did not try to cause another employee to quit; his comments to the technician about his own potential quitting was not misconduct. The reason the employer effectively discharged the claimant is in essence unsatisfactory job performance, not being able to complete the quantity of work or duties desired within the regular work hours, as well as his making of a complaint against his branch manager. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to be able to accomplish the amount of work the employer required within normal or reasonable business hours. Under the circumstances of this case, the claimant's lack of satisfactory job performance was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra.

Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The hours of service violation question occurred at least a month prior to the employer's discharge of the claimant, and the employer had known of the violations for at least two weeks. Even the claimant's leaving "early" on March 21 was ten days prior to the discharge. Based upon the evidence provided, 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 April 29, 2008 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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