IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

BRYAN K RICHARDSON
Claimant

PELLA REGIONAL HEALTH CENTER
Employer

APPEAL NO. 07A-UI-02685-SWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/18/07 R: 03
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated March 6, 2007, reference 01, that concluded he was discharged for work-connected misconduct. A telephone hearing was held on April 11, 2007. The parties were properly notified about the hearing. The claimant participated in the hearing with his attorney, John Fatino. Ashley Arkema participated in the hearing on behalf of the employer with a witness, Lisa Opfer. Exhibits One through Five and A and B were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time for the employer as a sleep lab technician from April 29, 2005, to February 8, 2007. Starting December 4, 2006, Lisa Opfer was his supervisor. The claimant's prior managers had considered him an exemplary employee and had rated him highly on evaluations.

Under the employer's work rules, full-time employees are permitted one unpaid meal break and two paid 15-minute rest periods per eight-hour shift. Time spent on rest breaks is considered time worked and employees are not required to clock out for rest breaks. The employer had adopted a practice of deducting a meal break without having a sleep technician punch out for the meal break. Opfer noticed times when sleep lab technicians did not have an option to take a meal break. Consequently, on January 8, 2007, she issued a memo stating that effective January 21, 2007, meal breaks would no longer be deducted from their hours and employees should clock out if they had a chance to take a meal break.

On January 10, Opfer issued a second memo. In this memo, she said employees were expected to work their scheduled shift and changes to the schedule were to be submitted to her in writing, subject to her approval or denial. In situations where this was not possible, she stated that she could approve changes if contacted by phone. The memo went on to provide an exception to this policy due to the nature of the department. Under this exception, if an

employee did not have a patient, the employee was given the option of going home early and taking paid time off if there were no work tasks to be done. The memo listed work tasks as filing and sorting charts, cleaning and organizing supplies, scheduling patients, handling faxes from clinics, scoring sleep studies, and completing any lists left by Opfer. When the claimant received the memo, he informed Ofper that he did not have the necessary credentials to score sleep studies because he was not a registered sleep technician, which is the required credential to perform such work.

On January 29, 30, and 31, 2007, Ofper observed the claimant in the cafeteria near the end of his shift and believed he was taking a meal break without clocking out. The claimant was not taking a meal break on any of these days. On January 29, during most of the time Ofper had claimed he was in the cafeteria taking a break, he was in consultation with a physician regarding a patient who had gone into cardiac arrest the night before. On January 30, he was escorting sleep study patients to the cafeteria for breakfast, which was performing work. On January 31, he took a rest break in the cafeteria near the end of his shift. He had never been informed that sleep lab employees were prohibited from taking rest breaks provided for under the employer's general rest break policy. Ofper never talked to the claimant on any of these days to find out what he was doing or caution him about his break practices.

On February 7, 2007, Opfer prepared a warning for the claimant for taking breaks while clocked in on January 29, 30, and 31, 2007. The claimant was called into a meeting with Opfer and human resource specialist, Ashley Arkema at the end of his overnight shift. The warning was presented to the claimant to sign. The warning provides that he was to take time to consider it before signing it, and by signing, it meant that he freely chose to agree to it and accept full responsibility for his actions. The claimant refused to sign the warning because he did not agree with the warning. He became angry and said it was pathetic to write him up. He called Opfer incompetent and ignorant. Arkema intervened and told him that it was inappropriate to address his manager that way, and if he had concerns, he could talk to her later. The meeting adjourned. Even though the claimant had displayed insolent conduct in the meeting, Arkema and Opfer did not decide to discharge him for that conduct.

The claimant was next scheduled to work from 7:00 a.m. to 7:00 p.m. on February 7. There were two patients originally scheduled for sleep studies that night. The employer maintains a communication log book in which managers write down instructions and tasks and employees record comments. In the communications book, Opfer had left a message for the claimant that they had canceled one of his two patients and she wanted him to score at least two sleep studies that evening.

The claimant got to work early on February 7 but after Opfer had left for the day. He was disturbed by the instruction to score two sleep studies because he had made it clear to her that he did not have the credentials to score sleep studies on his own. He spoke with Arkema and informed her about the note. He told her scoring sleep studies was not part of his job. He stated that he felt he was being set up and Opfer was going to write him up the next day for not scoring the sleep studies. He told Arkema that he wanted to resign. Arkema told him that if he was going to resign, he had to do so in writing. The claimant indicated that he was not going to resign at that time and would submit his written resignation to Opfer.

The claimant reported to work as scheduled at 7:00 p.m. The only patient scheduled that evening did not show up for the appointment. At approximately 11:00 p.m., scoring sleep studies was the only assigned task, which was a task he was not credentialed to perform. He decided to leave work early since there were no patients to monitor. He tried calling Opfer at home on her cell phone but got no answer. He was worried about being accused of being idle

for the remaining eight hours on his shift since he had no patients for the whole night. He wrote down in the communication log that his patient had not shown up, he had tried to call but got no answer, and he left at 11:00 p.m.

The next morning, Opfer informed Arkema that the claimant had left work early without scoring two sleep studies as she had directed. Consequently, at 10:30 a.m. they called the claimant. Initially, they informed him that he could resign, but when he indicated that he would not resign, they discharged him for insubordination in not scoring the sleep studies and leaving his shift early.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law provides for a disqualification for claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a. The first issue is whether the claimant should be considered to have resigned when he told Arkema he wanted to resign. The evidence is clear that even though he expressed the thought of resigning because he felt he was getting set up to be fired, he did not act on the statement and reported to work as scheduled. Furthermore, Arkema did not accept the verbal resignation and insisted that his resignation had to be in writing to be effective, which was not done. The separation from employment occurred through the discharge on February 8, 2007.

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).

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 N.W.2d 661, 665 (Iowa 2000).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof.

The next issue is determining what the current act is in this case. The current act of alleged misconduct has to be his leaving work early without scoring the sleep studies and without getting express permission from Opfer to leave. Arkema repeatedly testified that the claimant had not been discharged for taking unauthorized breaks or his conduct toward Opfer in the meeting. She testified that he would have continued in employment if he had not left work early without scoring the sleep studies and without getting authorization from Opfer to leave.

No willful and substantial misconduct has been proven in this case regarding the final act of alleged misconduct. The claimant testified that he did not have the credentials to score sleep studies because he is not a certified sleep technician. He had raised it previously as an issue with Opfer and Arkema. I am convinced he sincerely believed it was not a task he was credentialed for and his actions are consistent with that belief. Maybe the claimant's belief was wrong. The employer, however, has presented no convincing proof to the contrary. The evaluation does not support the employer because its language "assist with scoring sleep/wake stages." does not prove he was authorized to independently review and score sleep studies. The claimant did not commit willful misconduct by failing to score sleep studies.

An evaluation of the memo dated January 10, 2007, does not support the employer's assertion that there was a work rule that required overnight sleep technicians to get express permission from a supervisor before leaving work early. The memo lays out a policy that requires a request for a schedule change to be made in writing, or if that is not possible, by phone to the manager for approval. It then provides an "exception to this policy," which allows a worker who does not have a patient or any assigned work left to do the option of leaving work early and taking paid time off. By the terms of this exception to the policy, express permission from a manager is not a prerequisite to leaving, which is logical for an employee who works an overnight shift from 7:00 p.m. to 7:00 a.m. whose manager works a dayshift.

The claimant had no patients the evening of February 7. There were no assigned tasks that he believed he was qualified to perform. He did not want to be accused of "milking the clock," after just being accused for not clocking out for breaks. Although I do not believe the memo required him to get express permission to leave under the circumstances here, I believe his testimony that he tried to reach Opfer, but there was no answer. He left work and left a note stating the time he left. There was no misconduct in leaving work early.

Since there was not current act of work-connected misconduct, there is no need to evaluate the past acts to determine the seriousness of the final act that led to the claimant being discharged. I do not condone the claimant's calling his manager names even though he believed the

warning was unjustified and petty. In the end, however, that was not the reason for his discharge.

DECISION:

The unemployment insurance decision dated March 6, 2007, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

_____
Steven A. Wise
Administrative Law Judge

_____
Decision Dated and Mailed

saw/css