

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

DAVID B VORM

Claimant,

and

BROADLAWNS MEDICAL CENTER

Employer.

:
:
:
:
:
:
:
:
:

HEARING NUMBER: 11B-UI-13232

**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: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

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

FINDINGS OF FACT:

The claimant, David B. Vorm, worked for Broadlawns Medical Center from June 6, 1981 through August 20, 2010 as a full-time residential treatment worker. (Tr. 2) Part of his responsibilities included passing medications (meds) to patients via the medication book, which contained a photograph of each client with the meds each person was to be given. (Tr. 2-3, 6-7) The employer has a 'medical error policy,' the most recent (September of 2009) (Tr. 9-10, Exhibit A) of which provides,

“...Staff member involved in an error may be required to complete a summary of the occurrences from the variance report. This report is intended to gather data that will be used to coach staff or to modify processes for improvement...while staff remains accountable for errors made, it is the practice of the organization to handle the errors on a non-punitive basis.” (Tr. 8, 10)

The claimant used to pre-set meds, which means that he "...set up all meds for...all patients...in order to take them...give them as they come..." However, the employer at some point "...decided that that was...not the best way to do it." (Tr. 5) In February of 2010, the claimant received a written warning for issuing the wrong meds to the wrong patient. (Tr. 6)

August 20, 2010 was a very busy and confusing morning. (Tr. 4, 5) The claimant had no assistance from the day shift staff (Tr. 6) during which time Mr. Vorm pre-set Patient M's meds since she was up and about, but did not pre-set Patient L's meds, who would not get out of bed that day. (Tr. 4-5, 8) The claimant was on en route to giving 'L' her meds when 'M' (who is deaf and blind) came up to the office. Mr. Vorm was distracted and, inadvertently, handed L's medication to M, who had to have her actual meds held back due to the mix-up. (Tr. 2-3,) According to standard procedure (whenever such an error occurs), he reported the error and took the patient to the Emergency Room for evaluation. (Tr. 3-4, 7, 8) Mr. Vorm took her vitals and she remained in the ER for observation until she was later released without incident. (Tr. 7) The employer terminated him that same day. (Tr. 2)

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 establishes that Mr. Vorm was a long-term employee who received discipline for only two medication errors within the past year (February 2010 and August 20, 2010). This seven-month gap between two incidents does not constitute repeated negligence where there is no evidence of any other prior verbal or written warnings. Nor is there any evidence in the record to support that the claimant's 'pre-setting' of the patients' meds was prohibited. (Tr. 4)

According to the claimant's unrefuted testimony, the final incident occurred while he was short-staffed on an extremely busy morning when one of the patients was being very uncooperative (refusal to get out of bed). His attempt to manage that patient while another, unexpectedly, required his immediate assistance led to the error. While the circumstances do not excuse, nor do we condone his mistake, it is clear that Mr. Vorm did not intentionally cause harm to either of the patients.

The employer failed to participate in the hearing to refute any of the firsthand testimony presented by the claimant. For this reason, we attribute more weight to his version of the events. There is nothing in the record to show that Mr. Vorm was ever warned that his job was in jeopardy. Based on the foregoing, we conclude that the employer has failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated January 11, 2011 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser