

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY J SMITH
Claimant

APPEAL NO: 14A-UI-00163-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACK HAWK COUNTY
Employer

OC: 12/08/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Terry J. Smith (claimant) appealed a representative's January 2, 2014 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Black Hawk County (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was convened on January 29, 2014. The hearing was then reconvened and concluded on February 26, 2014. The claimant participated in the hearing, was represented by Luke Guthrie, attorney at law, and presented testimony from one other witness, Debra Vivians. Carol Laurie appeared on the employer's behalf. Three other witnesses, Angie Maus, Amanda Spore, and Gregg Hanson, were available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One and Two were entered into evidence. 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on August 19, 2008. He worked full time as a certified medications aide (CMA) in the employer's long-term care nursing facility. His last day of work was December 12, 2013. The employer discharged him on that date. The reason asserted for the discharge was violation of various procedures on November 22, 2013.

On November 22 the claimant had a dispute with another employee regarding some keys that had been taken. As a result of the dispute, Laurie, the director of health services, viewed surveillance video of the day. Separate from the dispute regarding the missing keys, Laurie observed a number of things which occurred during the day which were of concern. The

claimant had been assisting a resident with the resident's food, but the resident was refusing to eat the food. The claimant then took at least part of the food, some fruit, to a utility room and ate it himself. At one point the claimant was wiping down tables and chairs, tipping chairs up onto table where a resident was still eating. He also had a bucket of sanitizer that he was using to wipe down the furniture which he left setting on a table within a few feet of a resident.

The employer viewed the eating of the food as interference with an assessment as to whether the resident was able to eat appropriately. It viewed the claimant's placement of the chairs on the table and the setting of the bucket of sanitizer on the table in close proximity to a resident as being safety issues.

The employer did not directly address these issues with the claimant until he was discharged on December 12. The employer did hold a group meeting with all staff on November 26 in which it identified eating resident food, placement of chairs on tables, and placement of sanitizer within close proximity of residents to be improper.

Prior to November 22 the claimant had never been disciplined for any conduct issues such as what occurred on that date. He had been given several disciplines for medication errors, most recently a written warning on August 30, 2013, and on October 3 he had been given a verbal warning regarding observation of boundaries.

Prior to November 26 it had been a common practice for various employees in the unit in which the claimant worked to take uneaten food to the utility room and eat it themselves; the claimant had previously been told by a nurse that it was allowable. Prior to December 12 it had not been uncommon for various employees in that unit to follow the same procedure of cleaning the dining furniture as the claimant had followed, including leaving a bucket of sanitizer out within close proximity to residents.

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 gravity of the incident and the number of prior violations and prior warnings are factors considered when analyzing misconduct. The lack of a current or applicable warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant was his conduct on November 22, 2013. First, 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 incidents in question occurred almost three weeks prior to the employer's discharge of the claimant. Further, while the incidents may have been technically contrary to the employer's expectations, the specific expectations with regard to those behaviors had not been directly communicated or enforced in the past. Misconduct connotes volition. The claimant had not previously been warned that future incidents such as those exhibited that day could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984).

Under the circumstances of this case, the claimant's conduct on November 22 was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. 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 January 2, 2014 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs