

IOWA DEPARTMENT OF INSPECTIONS & APPEALS
Division of Administrative Hearings
Wallace State Office Building
Des Moines, Iowa 50319

Appeal Number: 11IWDUI046
OC: 06/27/10
Claimant: Appellant (1)

DECISION OF THE ADMINISTRATIVE LAW JUDGE

ROBERT DUT TALANG
8465 CLARK ST APT. 1
CLIVE, IA 50325-1044

MAINSTREAM LIVING
ATTN. HR DIRECTOR
333 SW 9TH STREET SUITE C
DES MOINES, IA 50309

JOE WALSH, IWD

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 the Department. 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)

May 6, 2011

(Dated and Mailed)

Iowa Code section 96.5(2)(a) – Discharge Based on Misconduct

Iowa Code section 96.5(1) – Voluntary Quit without Good Cause¹

¹ The issue in this case concerns Dut Talang's disqualification based on misconduct. Although Iowa Workforce Development indentified the issue of whether Dut Talang voluntarily quit his employment on the transmittal form, that was not the issue addressed by the parties at hearing. Dut Talang did not voluntarily quit. He was terminated from Mainstream Living following an investigation.

STATEMENT OF THE CASE

Claimant/Appellant Robert Dut Talang appeals from a decision by Iowa Workforce Development (“IWD”) dated December 17, 2010, reference 02, disqualifying him from receiving unemployment insurance benefits due to work-connected misconduct. Dut Talang appealed.

IWD transferred the matter to the Department of Inspections and Appeals to schedule a contested case hearing. A contested case hearing was held before Administrative Law Judge Heather L. Palmer on April 13, 2011. Dut Talang appeared and testified. Marcanne Lynch appeared and testified on behalf of Mainstream Living. Exhibits 1 through 13 and A through G were admitted into the record.

ISSUE

Whether the claimant was discharged for work-connected misconduct.

FINDINGS OF FACT

Mainstream Living hired Dut Talang as a supported living technician in July 2008. Dut Talang worked the night shift from 11:00 p.m. until 7:00 a.m. This case concerns events between Saturday, November 13, 2010 and Monday, November 15, 2010. Dut Talang was assigned to work at the McUnion building and the South Union building on these dates. The McUnion and South Union buildings are approximately 200 feet apart. Dut Talang also worked at the Freemont building. He was not scheduled to work at the Freemont building during the dates in question.

During the overnight shift from Saturday evening to Sunday morning, a consumer at the McUnion building under Dut Talang’s supervision consumed a significant amount of alcohol and required emergency treatment. The consumer’s roommate reported he attempted to locate Dut Talang, but could not find him. The roommate called 911 and paramedics arrived at the building and transported the consumer to the emergency room. Dut Talang was unaware the consumer had consumed the alcohol and that he was transported to the hospital. Mainstream Living learned of the incident after receiving a call from the Department of Human Services.

On November 15, 2010, a consumer reported that during the overnight shift from Sunday, November 14, 2010 through Monday, November 15, 2010, she witnessed Dut Talang leave the McUnion building shortly after 11:00 p.m. and return around 7:00 a.m. Another consumer, who had recently undergone surgery reported she arrived at the staff office in the McUnion building around 4:00 a.m. to obtain pain medication. She stated Dut Talang was not there and she waited at the office for his return. An employee working the day shift arrived at 6:45 a.m., observed the consumer, and administered her medication. The employee reported Dut Talang arrived to the work site in his vehicle a few minutes later. Dut Talang stated he had been at the South Union building. Mainstream Living found the consumer was without her pain medication for several hours.

Mainstream Living held an inquiry with Dut Talang on November 16, 2010. Dut Talang reported his computer at the McUnion building was not functioning and that he spent a significant amount of time at the South Union building completing his documentation. Dut Talang told Mainstream Living he completed his documentation from approximately 1:00 a.m. through 5:50 a.m. during the Saturday to Sunday overnight shift and he was unaware of the consumer's needs and trip to the hospital. Dut Talang reported he was uncertain how much time he spent at South Union building during the Sunday evening through Monday morning shift, but knew he was there longer than usual to complete his documentation. Mainstream Living noted Dut Talang stated he was aware the McUnion building was his primary site because the consumers' supervision needs were greater at the McUnion building than at the South Union building. Mainstream Living suspended Dut Talang's employment without pay on November 16, 2010.

Mainstream Living reviewed Dut Talang's documentation. Mainstream Living found inconsistencies between Dut Talang's explanation and the times he was logged onto the computer. Mainstream Living concluded Dut Talang had failed to explain his extended absences from his shift, and which resulted in failure to meet the basic needs of consumers under his supervision, including provision of emergency medical support on November 13-14, 2010, and pain management medication to a consumer in need on November 14-15, 2010.

Mainstream Living noted Dut Talang attended Modular 1: Workplace Orientation Training on July 20, 2010, where he was told the following types of behavior would likely result in termination of employment:

- Intentionally lying to consumers, co-workers, investigators, or supervisors.
- Falsification of records including but not limited to time cards/sheets, consumer observations, and medical records.
- Failing to provide the appropriate level of supervision, especially if it results in negative consequence to a consumer. This includes, leaving a shift early without permission.

(Exhibit 1). Mainstream Living concluded "Robert's absence of availability/supervision, the negative impact on the consumers/stakeholders and the inconsistencies in his account of his whereabouts during his scheduled work time is being considered misconduct." (Exhibit 1). Mainstream Living terminated Dut Talang's employment.

Dut Talang had been previously suspended without pay in June 2010 until he completed Training Modules 1 and 4. There was no evidence Dut Talang had been previously counseled or disciplined for failing to be at the McUnion building or another building during a scheduled shift.

Lynch testified Dut Talang was expected to be at the McUnion building during the majority of his shift. She reported the consumers at the McUnion building have a greater need for supervision than the consumers at the South Union building. Dut

Talang contends there was no written documentation telling him how to split his time between the McUnion and South Union buildings.

REASONING AND CONCLUSIONS OF LAW

A claimant may be disqualified from receiving unemployment insurance benefits if Iowa Workforce Development (“IWD”) finds the claimant has been discharged for misconduct in connection with the individual’s employment.² The employer bears the burden of proving the claimant is disqualified for misconduct.³ “Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits.”⁴

IWD’s rules define misconduct as: (1) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees; (2) carelessness or negligence of such a degree of recurrence as to manifest equal culpability, wrongful intent, or evil design; or (3) an intentional and substantial disregard of the employer’s interests or of the employee’s duties and obligations to the employer.⁵ 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 misconduct within the meaning of the statute.⁶ Because the administrative rules focus on conduct that was “deliberate, intentional, or culpable,” the Iowa Supreme Court has found that “whether misconduct has occurred requires proof that the employee acted intentionally; a showing of mere negligence is not enough to constitute misconduct.”⁷ “Carelessness amounting to misconduct occurs when an employee commits repeated instances of ordinary carelessness and not when the employee commits a single careless act after repeated instructions.”⁸

No willful and substantial misconduct has been proven in this case. While Dut Talang’s absences from the McUnion building are troubling, as well as the discrepancies between the computer logs and his account of what occurred, the record shows two isolated incidents of negligent conduct, which fall short of disqualifying misconduct. While the employer may have been justified in discharging Dut Talang, work-connected misconduct has not been established.

² Iowa Code § 96.5-2-a; *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000); 871 IAC 24.32(1)b.

³ *Lee v. Employment Appeal Bd.*, 616 N.W.2d 661, 665 (Iowa 2000)

⁴ *Id.* (quoting *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993)).

⁵ 871 IAC 24.32(1).

⁶ *Lee*, 616 N.W.2d at 665.

⁷ *Id.* (quoting *Reigelsberger v. Employment Appeal Bd.*, 500 N.W.2d 64, 66 (Iowa 1993)).

⁸ *Green v. Employment Appeal Bd.*, 426 N.W.2d 659, 661 (Iowa Ct. App. 1988).

DECISION

IWD's decision, reference 02, dated December 17, 2010, is REVERSED. Dut Talang is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

hlp