

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time hourly production employee from July 19, 2005 until she was discharged on August 29, 2005. The claimant averaged approximately 30 hours per week. The claimant was discharged for allegedly misrepresenting information to the employer on her post-hire health assessment. Once an employee has been offered employment and has accepted, the employer has the employee fill out a post-hire health assessment. One of the questions on the health assessment asks if the employee has had past problems with the employee's back or neck. The claimant answered no to this question. The post-hire health assessment form requires that employees fill it out truthfully and accurately and indicates that a false statement can result in termination of employment. Later, in a comment to the employer's Health Services, the claimant informed the Health Services that she had scoliosis in her back. Health Services then referred the claimant to Human Resources and the claimant made the same admission to the employer's witness, David Duncan, Complex Human Resources Manager. The claimant was diagnosed with a mild form of scoliosis in April of 2005. It had never interfered with her work before and her physician told her at that time that she would not have to report it to an employer. She was not given any treatment for the scoliosis at that time. When the claimant filled out the post-hire health assessment form she was rushing to finish it and did not think of her scoliosis since it had not interfered with her employment before. The employer's post-hire health assessment form is important to the employer so that the employer can place individuals in a safe employment situation. If the claimant had answered the question correctly, Mr. Duncan could not specifically state what actions the employer would have taken, if any, but did indicate that her application would have been reviewed by a physician. Her post-hire health assessment form was not reviewed by a physician.

Pursuant to her claim for unemployment insurance benefits filed effective September 11, 2005, and reopened effective October 2, 2005, the claimant has received unemployment insurance benefits in the amount of \$235.00 since separating from the employer on or about August 29, 2005 and filing for such benefits effective September 11, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

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(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The parties agree that the claimant was discharged but disagree as to the date. The administrative law judge concludes that the claimant was discharged on August 29, 2005, as testified to by the employer's witness, David Duncan, Complex Human Resources Manager. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Duncan testified that the claimant was discharged for misrepresenting information on her post-hire health assessment form. This form is given to employees after an offer of employment has been made and accepted by the employee. The form indicates that it must be filled out truthfully and correctly and that a false statement can result in termination. The claimant answered no to the question on the form as to whether she had past problems with her back or neck. However, later, the claimant informed the employer's Health Services Department that she had scoliosis of the back. The claimant had been diagnosed with scoliosis of the back in April of 2005. However, the claimant's scoliosis was mild and had never interfered with her work. She was not treated for it at the

time. At the time of the diagnosis her physician instructed the claimant that she would not have to inform an employer of this condition. When the claimant was completing the post-hire health assessment form she was rushing and was not thinking about her back problems since it had not caused her a problem with work in the past. The claimant did inform Mr. Duncan that she omitted the answer because she wanted to get her job back but credibly testified at the hearing that she was simply not thinking about the scoliosis when she completed the post-hire health assessment form. The post-hire health assessment form is important to the employer so the employer can place people in safe employment positions.

Although it is a close question, the administrative law judge concludes that the claimant did not willfully or deliberately make a false statement on this form. The administrative law judge is also not convinced that even if she had made a willful or false statement that it would result in endangering her health, safety or morals or result in exposing the employer to legal liabilities or penalties or result in placing the employer in jeopardy. The administrative law judge, for the purposes of the claimant's discharge, treats the post-hire health assessment form as a job application or application for work, although it is a form that is completed after an offer of employment has been made and accepted. Finally, the Supreme Court has ruled that a misrepresentation on a job application or application for work form, must be materially related to job performance to disqualify a claimant from receiving unemployment insurance benefits. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). The court did not define materiality in that case but cited Independent School District v. Hanson, 4012 N.W.2d 320 (Minn. App. 1987), which stated that a misrepresentation is not material if a truthful answer would not have prevented the person from being hired. Mr. Duncan could not testify as to what the employer would have done had the claimant answered the question on the post-hire health assessment form correctly. Later, Mr. Duncan testified that a physician would have reviewed the claimant's post-hire health assessment form had she answered the question truthfully. Without more, the administrative law judge is constrained to conclude that the employer has not demonstrated that the form is material. No doubt it was important to the employer, so the employer can place people in safe employment positions, but here the claimant testified that her scoliosis was mild and it had never interfered with her work. Accordingly, the administrative law judge is constrained to conclude that the claimant's statement was not willful or deliberate and did not endanger her health or the health or safety of others nor did it subject to expose the employer to legal liabilities or jeopardy nor was it material and therefore, the claimant's false statement on the post-hire health assessment form was not disqualifying misconduct.

In summary, and for all the reason set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department

in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$235.00 since separating from the employer herein on or about August 29, 2005 and filing for such benefits effective September 11, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of September 30, 2005, reference 01, is affirmed. The claimant, Amber M. Teague, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

dj/kjw