IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTOPHER S ERICKSON
Claimant

LIFEWORKS INC
Employer

APPEAL NO. 16A-UI-06959-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/29/16
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Lifeworks (employer) appealed a representative's June 15, 2016 (reference 01) decision that concluded Christopher Erickson (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 13, 2016. The claimant was represented by Stuart Higgins, Attorney at Law, and participated personally. Paul Johnston and Joby Holcomb also participated in the hearing. The employer was represented by Amanda Jansen, Attorney at Law, and participated by John Stanley. The claimant offered and Exhibits A, B, and C were received into evidence. The employer offered and Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 17, 2013, as a full-time therapist. The claimant signed for receipt of the employer's handbook on February 26, 2016. The handbook states that employees are "to promote the best interest of the agency. Any conduct that interferes with agency operations, discredits the agency or is disrespectful to our clients or co-workers is unacceptable." The employer does not have a non-compete clause. Over time many therapists have given notice and moved on to other practices or their own practices. The employer believed that it was fine for therapists to leave so long as sufficient notice was given to the employer.

The employer issued the claimant two written warnings. One was for not turning his notes in on time. The other warning was for using his cell phone during a therapy session. The client used a term the claimant did not understand and would not tell the claimant what it meant. The claimant told the client he was going to look up the term using Google on his cell phone. Later the client complained about the claimant's use of his cellphone during therapy.

The employer notified the claimant that further infractions could result in termination from employment. The employer told the claimant about four times that he should look for other employment options because it was not a good fit for him with the employer.

The claimant and two other therapists worked together at another business before working for the employer. For eight or ten years they had been planning on starting their own business. On December 3, 2015, the claimant filed a certificate of organization with the Secretary of State to establish a business that in the future could compete with the employer. On April 11, 2016, the claimant changed the name of the business to Synergy Clinical Services of Central Iowa, LLC. The claimant had many things to do before the business could open and he could see clients. He planned to notify the employer and give 30 to 90 days' notice of resignation when he was certain of a date the business could start.

On May 27, 2016, the employer discovered a mock business card for a co-worker with the new business logo. It also discovered that if one called the new business, the employer's administrative assistant's voice was on the answering machine. Six employees were involved in the new business. On May 27, 2016, the employer locked out the claimant from the business. On May 28, 2016, the employer terminated the claimant. If the claimant had discussed his leaving with the employer, he would not have terminated him.

The claimant filed for unemployment insurance benefits with an effective date of May 29, 2016. He received no benefits after his separation from employment. The employer participated personally at the fact-finding interview on June 14, 2016.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(1)a and (8) 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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

> (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 of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Although only preparing or making arrangements to enter into competition with one's employer does that employer no legally cognizable harm, soliciting fellow employees to leave their work in favor of a competitor breaches the employee's common law duty of loyalty. Porth v. Iowa Department of Job Service, 372 N.W.2d 269 (Iowa 1985). The employer did not offer any evidence of competition with the employer or solicitation of employees to work for his new business.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's June 15, 2016 (reference 01) decision is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

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