

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

VIOLET J BLACK
406 W MAPLE AVE
LIBERTYVILLE IA 52567-9755

GOOD SAMARITAN SOCIETY INC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

AMENDED
Appeal Number: 06A-UI-03798-DT
OC: 03/12/06 R: 03
Claimant: Respondent (2)

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 Workforce Development. 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)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Good Samaritan Society, Inc. (employer) appealed a representative's March 29, 2006 decision (reference 02) that concluded Violet J. Black (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 24, 2006 in conjunction with one related appeal, 06A-UI-03797-DT, regarding a duplicate representative's decision. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Fred Metcalf appeared on the employer's behalf and presented testimony from one other witness, Karen Kaiser. During the hearing, Employer's Exhibits One, Two, and Three were entered into

evidence. Based on the evidence, the arguments of the employer, 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?

FINDINGS OF FACT:

The claimant started working for the employer on September 25, 2000. For approximately the last two or three years, she worked full time as an overnight charge nurse at the employer's Ottumwa, Iowa, long-term care nursing facility, working a 10:00 p.m. to 6:30 a.m. schedule. Her last day of work was March 1, 2006. The employer suspended her that day and discharged her on March 10, 2006. The stated reason for the discharge was violation of the employer's drug policy.

On February 22, 2006, the director of nursing, Ms. Kaiser, received a report from one of the employer's two pharmacies that some of the drug cassettes that had been returned to it from the employer's facilities had been tampered with by having one side apparently opened and resealed with superglue. Ms. Kaiser then went and checked the medication cassettes that were currently in the facility, and found that the medication cassettes for one resident had been similarly tampered with, and that regular Tylenol® had been inserted into the cassettes in place of the prescribed hydrocodone/acetaminophen. The claimant was the nurse who had handled the medication changeover for that wing of the facility on February 21, 2006, but the employer did not immediately act, as there was at least one other nurse who theoretically could also have had access. However, Ms. Kaiser began carefully monitoring the medication trays.

There was another medication changeover on the night of February 28, 2006. The claimant did not do the changeover on the same wing as the week prior, but did do the changeover on another wing. On March 1, 2006, the employer received a report from the other pharmacy that it also had received back cassettes that had been tampered with and resealed with superglue, and that on the prior day the claimant had sent them a notice indicating that the pharmacy had failed to supply all of the ordered hydrocodone/acetaminophen for a different resident; the pharmacy established to Ms. Kaiser that it had, in fact, supplied the ordered amount. Upon review of the medication cassettes for that resident, Ms. Kaiser again found that the cassettes had been opened, the hydrocodone/acetaminophen switched for regular Tylenol®, and resealed with superglue. On March 2, 2006, additional tampered cassettes were discovered.

On March 1, 2006, because of the reasonable suspicion generated by the evidence of missing medication, the employer directed the claimant to submit a urine sample for drug testing. She was also placed on suspension at that time. The sample was split in the presence of the claimant and mailed to the employer's testing facility. It is unknown what testing process was utilized. A medical review officer did contact the claimant on March 7, 2006, but the claimant could not establish valid prescriptions for the drug test results, so on March 9, 2006, the testing laboratory reported to the employer that the claimant had tested positive for opiates and opiate/morphines for which she did not have prescription coverage. As a result, the employer informed the claimant of her discharge both verbally and by certified mail; however, the employer did not advise the claimant of her right to have the split sample retested at her expense at an accredited laboratory of her choice.

In addition to prohibiting being under the influence of a controlled substance, illegally used drug, or alcohol as confirmed by a drug or alcohol test, the employer's drug policy prohibits the use or possession of a controlled substance without a valid prescription. The controlled substance work rules further prohibit unlawful possession or legal drugs obtained illegally.

The claimant established a claim for unemployment insurance benefits effective March 12, 2006. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,323.00.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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); Iowa Code § 96.5-2-a.

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.

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).

The reason cited by the employer for discharging the claimant is violation of the employer's drug policy. To the extent the employer relies on the drug test results alone, the employer's argument would fail. In order for a drug testing violation of an employer's drug policy to be disqualifying misconduct, it must be based on a drug test performed in compliance with Iowa's drug testing laws. Harrison v. Employment Appeal Board, 659 N.W.2d 581 (Iowa 2003); Eaton v. Iowa Employment Appeal Board, 602 N.W.2d 553, 558 (Iowa 1999). The Eaton court said, "It would be contrary to the spirit of chapter 730 to allow an employer to benefit from an unauthorized drug test by relying on it as a basis to disqualify an employee from unemployment compensation benefits." Eaton, 602 N.W.2d at 558. In Harrison, the court specifically noted the statutory requirement that the employer must give the employee a written notice of the positive drug test, sent by certified mail, return receipt requested, informing the employee of his right to have the split sample tested at a laboratory of his choice and at a cost consistent with the employer's cost. The employer did not provide this notice, by certified mail or otherwise. A secondary deficiency is the failure to establish the method of testing as required by Iowa Code § 730.5-7(f)(1). The employer has not substantially complied with the drug testing regulations. The results of the drug test therefore cannot be utilized to establish misconduct.

The question then is whether sufficient other evidence excluding the drug testing results was presented to establish misconduct. The administrative law judge concludes that there is sufficient circumstantial evidence regarding the tampered medication cassettes and the claimant's involvement, particularly with no refuting evidence from the claimant, to conclude that she had illegally obtained and possessed controlled substances taken from the employer and the residents. The claimant's illegal acquisition of the controlled substances from the employer and residents shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's March 29, 2006 decision (reference 02) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of March 1, 2006. This disqualification continues until the claimant has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$1,323.00. However, this overpayment has already been established in the appeal decision 06A-UI-03797, reference 01.

ld/kkf/pjs