IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARY K KELLEY
Claimant

CROSSROADS OF WESTERN IOWA
Employer

APPEAL NO. 07A-UI-02064-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/28/07 R: 01
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Mary K. Kelley (claimant) appealed a representative's February 22, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Crossroads of Western Iowa (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 15, 2007. The claimant participated in the hearing and presented testimony from one other witness, Linda Kelley. Matt Zima appeared on the employer's behalf and presented testimony from two other witnesses, Deanna Johnson and Lora Jensen. During the hearing, Employer's Exhibits One through Six 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?

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on January 30, 2006. She worked full time as an intensive care facility (ICF) team leader in the employer's day care program providing services to persons with disabilities. Her last day of work was January 29, 2007. The employer discharged her on that date. The reason asserted for the discharge was issuance of a fourth disciplinary action to the claimant.

On January 29, the employer summoned the claimant into a meeting in which a number of performance questions going back to August 2006 were discussed, but ultimately the only issue discussed which was acted upon by the employer was a question relating to the following of proper medication passing procedures. The employer concluded that the claimant had violated the proper procedures and that that violation resulted in a fourth discipline.

The claimant had received a disciplinary warning on February 16, 2006 regarding proper clock-in procedure and for failing to follow proper procedure regarding obtaining proper authorization for treatment for a personal work injury. She had been given another discipline on

September 25, 2006 for failing to properly call in an absence. On December 12, 2006, she was given a warning for using the employer's phone number on solicitation posters regarding the sale of puppies. That warning was designated as for a violation of a "Group II" rule under the employer's disciplinary policy and procedure. (Employer's Exhibits Four, Five.) The prior disciplines were not specified as to which group they fell under, but appear to be either under "Group I" or "Group II." The December 12 warning further declared, "The next violation will result in termination."

The employer's disciplinary policy states that its rules are in three categories, based on the severity of the offense. "A combined violation of any three of the rules of Group I and II, occurring within one year, shall be just cause for termination." Penalties for Group I specify that for a first offense there would be a written warning with possible probation, a second offense would be a written warning "and/or" a suspension, and a third "or continual" offense was possible termination. Penalties for Group II specify that for a first offense there would be a written warning, probation, "and/or" a suspension, a second offense would be a written warning, probation, "and/or" a suspension, or possible termination, and a third offense was termination.

The circumstances which led the employer to the conclusion that the claimant had failed to follow medication passing procedures as instruction began on January 16, 2007. Prior to that time, the claimant was only responsible for passing medication to about two persons in the ICF program in which she worked, and she had passed those medications individually from the medication containers to the clients. On January 16, the employer moved medications for participants in other service programs from the main office area into the ICF area. The claimant had not been on duty on January 16 and had been unaware of the plan to move the medication. When she returned to work she discovered the medications had been moved and that she was responsible for passing the medication to an additional approximately three more clients.

The claimant found it was very time-consuming to attempt to pass the medications individually to the five clients. She made some attempts see if she could use the medication tray that had been in the office area, but had been unsuccessful in getting a response, so she began to place the medications into paper medication cups with client medication identification slips inserted into the cups. She then placed the cups on a paper plate and distributed the medications to the clients. On January 24, she did have an opportunity to ask Ms. Jensen, her service coordinator, about the medication tray. The medication tray had indentations into which different clients' medications could be placed and slots into which the client medication identification slips could be slipped. Ms. Jensen agreed that it would be alright for the claimant to get and use the medication tray, but indicated that it was "preferred" that the medications be passed to the clients individually from the medication containers.

The employer received two statements from other employees reporting that the claimant had been passing the medications simply on a paper plate. One of the statements was dated January 25 and referenced the claimant passing medications on the paper plate on January 24. (Employer's Exhibit Three.) The statement asserts that there were no client names or labels on anything, and that the claimant had stated "it was too much work to give the meds out the way Lori told me to do it." The other statement is dated January 26 and references the claimant passing medications on an unspecified date. (Employer's Exhibit Two.) That statement asserts that the claimant filled medication cups with clients' medications, placed the medication cups on a paper plate, and then passed the medications to the clients. An undated addendum on the statement asserts that the claimant "did not use the name cards on the plate when passing meds."

These reports triggered the employer to bring the claimant in for the discussion which led to her discharge on January 29. The employer initially inferred that the claimant had been passing the medications on the paper plate with no physical segregation, i.e., loose, not using the medication cups. It is clear even from Employer's Exhibit Two that the claimant was using medication cups on the paper plate. The claimant acknowledged using the medication cups on the paper plate up until the time on January 24 that Ms. Jensen told her she "preferred" individual passing of the medications directly from the medication containers, but that from that point forward she did pass the medications directly. It cannot be determined from Employer's Exhibit Three that the incident reportedly observed on January 24 was before or after the claimant had the discussion with Ms. Jensen. In the claimant's first-hand testimony at the hearing she denied passing the medications using the paper plate after the discussion with Ms. Jensen and denied stating that it was too much work to give them out as she had been told. It cannot be determined from Employer's Exhibit Two whether the incident referred to was observed on the date the statement was written or whether the statement was written reflecting back to an incident several days prior. Both statements assert that there were no client identifications "on the plate" or "on anything" on the plate; however, in the claimant's first-hand testimony at the hearing she asserted that she did use identification slips which she placed inside the medication cups, not on the plate, so that the slips could not get mixed up on the plate.

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).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is passing the medications contrary to the instructed procedures. The claimant's first-hand testimony denied using the medication cup/paper plate method after being told on January 24 that individual passing was preferred. No witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand accounts from the two employees; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether they might have been mistaken, whether the dates and times of the alleged passing of medication in the cups on the paper plate was in fact before or after the discussion between the claimant and Ms. Jensen, whether they actually observed the entire time or were able to see into the medication cups, or whether they are credible. Under the circumstances of this case, the administrative law judge concludes that the claimant's testimony is more credible. Likewise, as to the acknowledged passing of the medication in the cups on the plate prior to the discussion, the employer has not presented sufficient direct evidence that the claimant did not in fact have the identification slips in the medication cups as she asserted in her first-hand testimony.

To the extent the employer relies on the claimant's acknowledged passage of the medication with identification slips in the cups on the paper plate as being improper, the employer has not presented any persuasive evidence that this manner of passage was below the standard of practice in contrast to the passage of medications on the medication tray which would have been within the standard of practice. The employer has not established that the potential

consequences in the event the paper plate with medications had been dropped would be any different than that if a medication tray had been dropped. The employer has not established that the claimant's choice to use the cups and plate prior to the January 24 discussion was substantial misbehavior, as compared to inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, or a good faith error in judgment or discretion. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The employer has not met its burden to show that the claimant passed the medications in a manner that would be disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's final actions which caused her termination were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 22, 2007 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 she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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