IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KEVIN G COLBY
Claimant

COMMUNICATION DATA LINK LLC
Employer

APPEAL NO. 07A-UI-07631-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/28/07 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Communication Data Link, L.L.C. (employer) appealed a representative's July 30, 2007 decision (reference 01) that concluded Kevin G. Colby (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, an in-person hearing was held on August 29, 2007. The claimant participated in the hearing and was represented by Mark Sherinian, attorney at law. Ann Holden Kendell, attorney at law, appeared on the employer's behalf and presented testimony from two witnesses, Chuck Mutchler and Rick Adams. During the hearing, Employer's Exhibits One, Three, Four, Five, and Six, and Claimant's Exhibit C, were 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:

The claimant started working for the employer on August 25, 2003. He worked full time as a bore foreman in the employer's utility construction business. His last day of work was June 1, 2007. The employer discharged him on June 8, 2007. The stated reason for discharge was harassing the employer's doctor's office.

Due to some concerns regarding the claimant's attendance and job performance, together with explanations the claimant had provided regarding an ongoing medical condition he had that necessitated that he take certain medications, including pain medications, on May 16 Mr. Mutchler, the employer's general manager, requested the claimant to submit to a fitness for duty examination by the employer's physician. (Employer's Exhibit Four.) As a result, the claimant submitted to the examination on May 22. On or by June 1 the physician provided the employer with her assessment of the claimant, indicating that the claimant "may have difficulty operating equipment while taking these pain medications. I believe that he could do a job that does not involve operating equipment." (Employer's Exhibit Five.)

On Friday, June 1, Mr. Mutchler brought the claimant in to discuss the assessment. He informed the claimant that he could not allow the claimant to continue working while taking the pain medications and told the claimant that he would be off work until or unless he provided some plan of action under which the claimant could assure the employer he would not be working while taking pain medications. The claimant was then put off work and sent home. The following week he contacted or attempted to contact Mr. Mutchler several times seeking to return to work; on June 6 (Wednesday) he provided Mr. Mutchler with a statement expressing concern over Mr. Mutchler's having access to his medical records, but also stating, "[H]ere is my plan – I will not take my medications at work. I will not stop taking my medications that are prescribed to me by my doctors. My doctor advised me not discontinue my medication." (Claimant's Exhibit C.) It is unclear whether the employer found this to be satisfactory or whether the employer still expressed concern that this was ambiguous as to whether the claimant might still be "under the influence" of some narcotic pain killer during the time the claimant was at work, but resolution of that fact issue is not critical to the outcome of this case; it is clear that the claimant had not been returned to work status by Friday, June 8.

On June 8 Mr. Mutchler received a call from the employer's physician reporting that the claimant was "harassing" the office; he did not obtain any details as to what the claimant had actually said or done that the physician concluded was "harassment." As a result of the physician's report, Mr. Mutchler contacted the claimant and left a message that the claimant was discharged due to the harassment of the physician.

The "Communication Flowsheet" from the employer's physician's office (Employer's Exhibit Six) reflects one contact with the claimant on May 23 regarding access to the claimant's medical records for 2007 from the claimant's personal doctor; the staff person making the notation indicated that after he or she explained what was needed, the claimant had "said OK and hung up." The only other documentation of communication with the claimant (or his wife) was noted on June 8; first, there is a notation of a discussion with Mr. Mutchler in which the person making the notation, potentially the physician herself, indicates that they informed Mr. Mutchler of the claimant's and his wife's "calls to this office [regarding the] letter for fitness for duty." The note further reflects that Mr. Mutchler responded that he may have given the claimant a copy of the letter, but that he "does not know what prompted today's calls."

The flowsheet then indicates a contact later that day between the claimant's wife and a staff person; that staff person noted:

> [3:30] Mrs. Colby called me [and] asked if I thought she [and] her husband were harassing me. I told her no, I was just trying to help them. She said 'someone' called Kevin's employer complaining that I was being harassed by him, [and] consequently he was immediately terminated. I said [the physician] was trying to call the employer but I wasn't aware of the complaint. [4:35] When I spoke [with the] doctor, she said she told the company that they were harassing me. I told her that Kevin was very nice but upset [regarding personal health information] being disclosed to his company. I also said that I would not reveal any info to Mrs. Colby because she was not the patient. I also told her Kevin had been fired. She said it must have happened [because of] her conversation [with the] employer.

The claimant acknowledged that he had contacted the physician's office on June 8 expressing concern that the employer had been provided with what he considered to be confidential medical information; however, he denied that he had been aggressive or abusive toward the staff person to whom he had spoken.

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.

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 the employer's conclusion based upon the employer's physician's conclusion that the claimant had harassed the physician's office staff person. The employer has not established by a preponderance of the evidence that there was a valid basis for that conclusion; even the notation of the physician's staff person themselves denies that the claimant had acted inappropriately in expressing his concern. Regardless of whether the employer had some other good business reason for discharging the claimant, as to the stated reason for the termination the employer has not met its burden to show disqualifying misconduct. Cosper, supra; Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 30, 2007 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw