IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

MATTHEW C COOPER Claimant **5TH JUDICIAL DISTRICT** Employer	**APPEAL 15A-UI-10705-JC** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/30/15** **Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the September 16, 2015, (reference 01) unemployment insurance decision that allowed benefits based upon separation. The parties were properly notified about the hearing. An in-person hearing was held in Des Moines, Iowa, on October 26, 2015. The claimant participated personally. The employer participated through Jennifer Reynoldsen, Probation and Parole Supervisor. Dr. Tony Tapman, also attended the hearing on behalf of the employer. Claimant Exhibits A, B, and C were admitted into evidence. Employer Exhibits 1 through 21 were also admitted into evidence. The administrative law judge took official notice of the administrative record, including fact-finding documents.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?

Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?

Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full time as a psychologist and was separated from employment on August 26, 2015, when he was discharged for the "totality and cumulative effects of Dr. Cooper's insubordination by not following directives and work rules, as well as repeated instances of deception." (Employer Exhibit 1).

The employer has a policy which prohibits employees from engaging in outside employment that may be in conflict with their duties for the employer (Employer Exhibit 7) and required employees to receive permission to engage in outside employment. On January 1, 2014, the claimant was approved to engage in outside employment, by way of a private practice that saw

primarily children and adolescent patients (Employer Exhibit 9). By restricting the patient population, the claimant was able to minimize exposure to adult patients that may be a conflict of interest with this employer.

In early 2015, the claimant self-reported a potential conflict that he identified from his private practice which subsequently interfered with his ability to see a patient through the employer. The matter was investigated, and the claimant was not issued disciplinary action in response.

The employer revised its policies (Employer Exhibit 11) determined that all employees would need to reapply for permission to retain outside employment (Employer Exhibit 3), whether the employee worked at a retail store, or had a private practice as the claimant did. The claimant first submitted his request to retain his second job on June 4, 2015, and it was denied (Employer Exhibit 9). The claimant again submitted a more specific request on June 8, 2015, (Employer Exhibit 10). On June 10, 2015, the claimant and Director Sally Kreamer exchanged emails about the claimant's process to screen potential conflicts (Employer Exhibit 15). During the exchange of emails between the claimant and Director Kreamer, both parties requested clarification. The claimant and the employer by way of director also exchanged a series of emails around June 24 and June 25 including "you will stick with your original population which was adolescents and children" (Employer exhibit 6). The claimant responded with "I disagree." Directory Kreamer responded, "If you continue to work this job, you are in violation of our policy" (Employer Exhibit 2).

On July 6, 2015, the claimant was placed on administrative leave pending investigation. In a letter dated July 24, 2015, the claimant indicated he was no longer taking new clients. (Employer Exhibit 16) and expressed concern about stopping treatment. On July 28, 2015, the claimant's attorney sent a letter to Director Kreamer, outlining the concerns of discontinuing the claimant's private practice without time (Employer Exhibit 18). Between the time of the claimant's administrative leave and separation, the evidence was disputed as to what steps were made by either party to communicate and/or resolve the pending conflicts at hand. The claimant sought counsel, advice on his ethical duties, and continued seeing patients. The claimant's response to having his request for outside employment denied was that it was retaliatory by Director Kreamer, and so he filed a grievance in response (Employer Exhibit 5-L) by way of the employer's collective bargaining agreement. Director Kreamer did not attend the hearing but provided a written statement prepared post-separation (Employer Exhibit 13). The employer at one point prank called the claimant's office as a test to see if he was still seeing new patients, which was interpreted as the claimant was not winding down his adult patients, or alternately his practice altogether (employer exhibit 19). No document was presented at the hearing regarding the terms of compliance to retain employment and the outside employment, or the parameters or timeline of the administrative leave. The claimant was subsequently discharged on August 26, 2015.

The termination letter itself does not refer to the outside employment as a consideration or final incident for discharge (Employer Exhibit One.) At the hearing, when questioned about why the claimant was discharged, the employer testified it was for both not having an effective screening tool and for continuing to practice including adult patients.

The claimant's disciplinary action included a warning for insubordination on September 24, 2014, when the claimant refused to perform work because he believed it was unethical. The claimant was issued a warning on December 2, 2014 for failure to submit a booklet to Dr. Tapman as requested. The claimant was also issued a one-day suspension, July 1, 2015, for his failure to complete a requested assessment of a sex offender. The warnings were not provided for the hearing.

The administrative record reflects that claimant has received unemployment benefits in the amount of $2778.00, since filing a claim with an effective date of August 30, 2015, through the week ending October 10, 2015. The administrative record also establishes that the employer did participate in the fact-finding interview on September 15, 2015.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The law defines misconduct as:

> 1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
> 2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
> 3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the

following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In this case, the claimant had prior approval to perform services as a psychologist, in outside employment, effective January 2014. It was the employer and claimant's understanding at that time that the claimant would focus on non-adult patients to avoid potential conflicts with the employer's patients. In light of the limitation, the claimant self-reported a potential conflict, and all employees (not just the claimant) were requested to resubmit approvals for outside employment. The claimant made two attempts to submit his request to retain his private practice operations but was denied.

The administrative law judge is sympathetic to the reasonable positions of each party because of the failure to communicate promptly and clearly with each other, however, the employer carries the burden of proof in a discharge from employment. The employer relied heavily upon the emails exchanged between Director Kreamer and the claimant, and yet, both parties expressed confusion throughout the exchanges (Employer Exhibits 2 and 8). The claimant failed to update the employer of his plan to cease adult patients but and plan to uphold his ethical obligations, and instead relied upon the more adversarial route of filing a grievance and having legal counsel contact the employer. Most concerning is the fact the employer did not lay out its specific requirements and expectations for the claimant in order to retain employment, either prior to placing him on administrative leave, or at the time of the leave, so that both parties could reasonably take the steps to either preserve or alternately, sever, the employment.

In the absence of Director Kreamer, the employer was unable to present credible evidence that the claimant willfully and deliberately disobeyed any directive. When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The person with the most direct knowledge of the situation, other than claimant, was Director Kreamer, who did not attend the hearing. Her post-separation written statement contradicted other written documentation provided by the employer, as well as the testimony of Jennifer Reynoldsen, who indicated it was both the screening mechanism *and* the continuation of services that caused the claimant's discharge. In the statement of Director Kreamer, she referenced the screening process and continuation of working with children rather than adults

was at issue with the continued second separation (Employer Exhibit 13). However, in the second request for outside employment, the director's comments state, that the claimant is "unwilling to follow our agreement not to see adolescents and children and that this employment is thus denied" (Employer Exhibit 12). Ms. Kreamer did not attend the hearing and so the contents or disputed statements made by her, were unable to be further examined for clarity. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer. It is understandable that in light of the discrepancies, that the claimant did not have clear guidance of what was required to be in compliance with the employer's policies and expectations for his second employment.

On June 25, 2015, Director Kreamer directed the claimant to cease his private practice or continue knowing he was in violation of the employer's policies (Employer Exhibit 2). The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Dep't of Job Serv.*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The employer's concerns for its employees, who work with court ordered patients requiring treatment, exposed employees to some unique challenges in terms of possible conflicts. The claimant's private practice highlighted the exact concerns the employer sought to prevent; that he would be paid by a patient for services but then have to deny services later to the same patient, when the court order the patient to be seen by him, and he was no longer able because of their prior relationship. Or alternately, a patient may be seen first through the court ordered treatment and then wish to continue on after the court ordered treatment and the claimant would receive payment for performing the subsequent services in his private practice. Under these circumstances, the employer's directive requiring prior permission was reasonable.

The claimant's reason for non-compliance lodged on two issues: Ethically, he had concerns about ceasing treatment with established patients, without proper handoff of the patients, and also, the requirements to be in compliance based on a screening process were never made clear. The claimant took active steps to wind down the adult portion of his practice and requested clarification repeatedly on what was needed for screening purposes. Therefore, based on the evidence presented, the administrative law judge concludes the claimant's reasons for non-compliance were not misconduct. While the employer may have been justified in discharging the claimant, work-connected misconduct as defined by the unemployment insurance law has not been established in this case. Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading separation was misconduct under Iowa law. Since the employer has not met its burden of proof, benefits are allowed.

Because the claimant is eligible for benefits, he has not been overpaid benefits. As a result, the issues of recovery of any overpayment and possible relief from charges are moot.

DECISION:

The September 16, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed,

provided he is otherwise eligible. The claimant has not been overpaid benefits. The account of the employer shall be charged.

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Jennifer L. Coe
Administrative Law Judge

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Decision Dated and Mailed

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