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

Appeal Number: 06A-UI-02723-DT
OC: 02/05/06 R: 01
Claimant: Respondent (1)

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.

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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's February 27, 2006 decision (reference 01) that concluded Christine A. Lampe (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 7, 2006. The claimant participated in the hearing and was represented by Joshua Walsh, attorney at law. Thomas Morrisey of TALX Employer Services, formerly known as Johnson & Associates, appeared on the employer's behalf and presented testimony from three witnesses, Wilma Frey, Connie Harmon, and Bev Reis. During the hearing, Employer's Exhibits One through Six and Claimant's Exhibits A through F 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 September 22, 1998. She worked full time as a dietary manager in the employer's long-term care nursing facility. Her last day of work was February 2, 2006. The employer discharged her on February 3, 2006. The reason asserted for the discharge was altering her work schedule to avoid the punitive effect of a suspension.

On January 18, 2006, Ms. Frey, the facility administrator, gave the claimant a three-day suspension because she had called a health care provider to clarify a restriction of an employee who had been released to return to work. Ms. Frey concluded that the contact was a violation of HIPAA regulations; the claimant maintained that it was not a violation, and that she had been instructed to make the contact by Ms. Harmon, the director of nursing and acting administrator. The suspension document (Employer's Exhibit One) specified that "personnel actions need to be discussed with administrator to ensure proper procedures are followed" and "failure to follow this procedure may result in further disciplinary action up to and including termination." Ms. Frey separately conveyed to the claimant that the suspension would be January 23, January 24, and January 27, 2006. The claimant had previously issued her department's schedule indicating she would have worked shifts on those days. She normally worked approximately 40 hours in a pay period. The pay period in question began January 19 and ended January 31, 2006.

The claimant ultimately worked about 72.25 hours during the pay period. In addition to the hours she had previously scheduled for herself, although she did not work on January 23 and January 24 because of the suspension, she worked two shifts on January 22, two shifts on January 28, and a shift on January 30, 2006. She did work a shift on January 27, a date that was supposed to be a suspension, because an employee who had been scheduled to work that day in lieu of the claimant called the claimant the evening of January 26 indicating that she could not work, so the claimant called Ms. Frey that evening and was given permission to work on January 27, 2006.

Regarding January 27, there had been another employee who had been scheduled to work on both that day and January 30 who on January 19 was offered by the claimant to Ms. Harmon to work in another area in which the employee was being trained, thus alleviating a staffing shortage in the other area. The claimant then filled in for that employee's replacement's hours in the kitchen on January 27 when the replacement became unavailable, and further filled in for the employee on January 30. She worked the two shifts on January 22 because two employees had contacted her and indicated that they could not work the two different shifts and could not find replacements, so it was the claimant's responsibility to fill the shifts. For January 28, the claimant committed to covering for an employee who had contacted her about being unavailable for her shift that day. Further, on or about February 27, she spoke to her assistant manager, Ms. Reis, about her schedule to work a shift on February 28 even though it would have been Ms. Reis' sixth consecutive day working, including a double shift on one day. The claimant offered to switch shifts by working Ms. Reis' shift on February 28 and having Ms. Reis work one of her future dates.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. 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 section 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 the conclusion that she had altered the work schedule to negate or avoid the disciplinary impact of the three-day suspension. Given that Ms. Frey had allowed the claimant to work on one of the days and had not specified that it was to be made up by "sitting out" another day before the end of the pay period, January 31, 2006, the most that the claimant's hours would have been reduced during that pay period would have been two days' pay, so her hours would have been 64. Her time was ultimately approximately 72 hours, so effectively she was only short about one day's pay. Ms. Frey had not specified that any changes the claimant made to the schedule during the pay period must be confirmed by her; the claimant reasonably believed that it was still her responsibility to ensure that the department's staffing was properly covered, even if it meant covering the hours herself. Under the circumstances of this case, the claimant's modifications to the schedule was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. 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 February 27, 2006 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 she is otherwise eligible.

ld/kkf