IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JASON E WARNSTAFF
Claimant

NEW CHOICES INCORPORATED
Employer

APPEAL NO. 09A-UI-11115-DT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 07/05/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or Disciplinary Layoff

STATEMENT OF THE CASE:

New Choices Incorporated (employer) appealed a representative's July 29, 2009 decision (reference 01) that concluded Jason E. Warnstaff (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 August 19, 2009. The claimant participated in the hearing. Cindy Hazelwood appeared on the employer's behalf. 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 suspended or discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 25, 2006. He worked full time as direct care associate in a group home for adults with special needs. His last day of work was June 15, 2009. He was informed on June 17 he was being suspended pending the outcome of a criminal investigation regarding off-duty conduct. When picking up a paycheck on July 1, he was instructed that he had to fill out an exit interview separation form.

On or about June 17, the claimant's supervisor learned from a law enforcement officer that the claimant was under investigation for possibly illegal sexual conduct with a 15-year-old female. There is no suggestion there is any direct connection between the alleged conduct and the claimant's work. The employer has a policy specifying that the employer can impose discipline for "off-duty behaviors that adversely affect" the employer. The employer suggested that, if true, the claimant's alleged off-duty conduct could adversely affect the employer in that there could be situations in which there could be neighbors of the adult group home that could have minor girls. The employer determined to suspend and then effectively discharge the claimant to avoid any potential problems. Criminal charges were not filed until on or about August 6. The

claimant denies the allegations, and the criminal matter is pending. The employer provided no evidence regarding the potential truth of the allegations.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has suspended or 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 suspended or discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). For purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct must be resolved. 871 IAC 24.32(9). 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).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish by a preponderance of the evidence that the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for suspending and effectively discharging the claimant is the allegations of possible off-duty criminal conduct. First, it is unclear that the employer has established sufficient connection between the claimant's work and the alleged conduct for it to be "work-connected" misconduct. Under the definition of misconduct for purposes of unemployment benefit disqualification, the conduct in question must be "work-connected." Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). The court has concluded that some off duty conduct can have the requisite element of work connection. Kleidosty v. Employment Appeal Board, 482 N.W.2d 416, 418 (Iowa 1992). Under similar definitions of misconduct, it has been found:

> In order for an employer to show that is employee's off-duty activities rise to the level of misconduct in connection with the employment, the employer must show by a preponderance of the evidence:
>
> > [T]hat the employee's conduct (1) had some nexus with her work; (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a)

violative of some code of behavior impliedly contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer.

Dray v. Director, 930 S.W.2d 390 (Ark. App 1996); In re Kotrba, 418 N.W.2d 313 (SD 1988), quoting Nelson v. Department of Employment Security, 655 P.2d 242 (WA 1982); 76 Am. Jur. 2d, Unemployment Compensation §§77–78.

However, more importantly, a mere allegation of misconduct without additional evidence is not sufficient to result in disqualification. 871 IAC 24.32. Even criminally, he is presumed innocent until proven guilty. While the employer may have had a good business reason for suspending and effectively discharging the claimant, it 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 July 29, 2009 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

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