

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIELLE R STAGG
Claimant

APPEAL NO: 12A-UI-04969-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 03/25/12
Claimant: Appellant (2)

Iowa Code § 96.5(2)a - Discharge

STATEMENT OF THE CASE:

The claimant appealed a representative's April 20, 2012 determination (reference 01) that disqualified her from receiving benefits and held the employer's account exempt from charge because she had been discharged for disqualifying reasons. The claimant participated in the hearing. Joseph Younker, attorney at law, represented the employer. Sheryl Knutson, and Kim Lopez, the nurse manager, appeared on the employer's behalf. During the hearing, Employer Exhibits One through Five and Claimant Exhibit A were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant is qualified to receive benefits.

ISSUE:

Did the employer discharge the claimant for reasons constituting a current act of work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in June 2000. She worked as a weekend staff nurse. During her January 29, 2012 shift, the claimant was patient X's primary nurse. Patient X was hospitalized and in isolation for an infection. During her shift, patient X asked the claimant to put earrings back into his ears. The patient had surgery and his earrings had to be removed before the surgery. The claimant disinfected the earrings before she reinserted them in his ears.

While the claimant was in his room, the patient and his friend, who was also patient X's roommate in the hospital, started talking about nipple piercings and tattoos. They made some inappropriate comments. J.O., a nurse technician, and the claimant were in the room when some or all of this conversation took place. The claimant did not say anything to stop the men from making inappropriate comments. While the claimant did not feel comfortable during the comments, she laughed or giggled at some comments. At some point, K.A. walked into the room because she needed the claimant's assistance with another patient. When K.A. walked in, the patient and his friend were talking about nipple piercings. (Employer Exhibit Two.) The claimant left the room to help K.A.

Later, J.O. told K.A. that the claimant planned to pierce the patient's nipple because it had closed. J.O. reported to another employee, M.D., that the claimant tried to re-pierce patient X's nipple. J.O. either reported this incident to the charge nurse or the charge nurse already knew about the alleged re-piercing incident. J.O. overheard the claimant telling M.D. about trying to open up patient X's nipple piercing at the end of the shift. (Employer Exhibits Two and Four.)

There were rumors that the claimant had tried to re-pierce a patient's nipple during her January 29 shift. On March 23, J.O. reported that on January 29, the claimant tried to re-pierce a patient's closed nipple piercing. Lopez obtained written statements from J.O., K.A., and M.D. about the January 29 incident. When Lopez talked to the claimant, she admitted she reinserted the patient's earrings in his ears after he asked her. She also acknowledged she remained in the room when the patient and his friend engaged in inappropriate comments. The claimant denied she tried to re-pierce the patient's nipple. The claimant asked the employer to contact patient X to verify her account of what took place when she worked with him on January 29. The employer did not contact patient X. Patient X submitted an affidavit that supports the claimant's version of what she reported to the employer. (Claimant Exhibit A.)

On March 28, the employer discharged the claimant for attempting to reopen patient X's nipple piercing, for engaging in inappropriate conversations with patients, and for contacting staff when the employer was investigating this matter. (Employer Exhibit Five.) The employer concluded the claimant violated the employer's code of conduct and standard nursing practice. (Employer Exhibit One.)

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is 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 are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act. 871 IAC 24.32(8).

Based on an employee's report and written statements, the employer concluded the claimant tried to re-pierce a patient X's nipple while he was under her care on January 29. The claimant admitted patient X talked about getting his nipple re-pierced, but she did not offer or even try to do this to him. Patient X's affidavit verifies her testimony. J.O. did not testify at the hearing, but the employer asserted her version was supported by the written statements of K.A. and M.D. Both indicated the claimant made comments about re-piercing the patient's nipple, but admitted the claimant is sarcastic and did not really think she had done this. The charge nurse on duty heard the rumors about this incident, but did not believe the rumors. The charge nurse did not investigate or report the rumors when she heard them. The fact the charge nurse did not report the rumors to Lopez supports the claimant's testimony. Even though the employer concluded the claimant tried to re-pierce patient X's nipple, based on the evidence presented during the hearing, this conclusion is not supported by the evidence.

The employer also discharged the claimant for engaging in inappropriate comments with the patient. The claimant acknowledged she should have left the room when this took place, but did not. Both she and J.O. were in the room and neither left or specifically told the patients their comments were inappropriate. The claimant's decision to remain in the room during the inappropriate comments shows a lack of professionalism and is not conduct a professional should engage in or be part of. Even though the claimant contacted J.O. about the January 29 incident, the employer had just arranged a meeting with the claimant but had not instructed her not to talk to J.O. or anyone else about the January 29 incident. The claimant also admitted that she reinserted the patient's earrings after he asked her. The claimant's conduct in the above incidents demonstrates poor judgment, but does not rise to the level of work-connected misconduct.

Since the charge nurse knew about or at least heard rumors about the January 29 incident about the time it occurred and did not report the rumors to Lopez, there is an issue of whether the claimant was discharged for a current act of work-connected misconduct. Even though Lopez did not learn about the incident until March 23, a supervisor, the charge nurse, knew about the incident or alleged incident in late January. The employer discharged the claimant for reasons that do not constitute a current act.

If the current act provision does not apply, the evidence does not support the employer's conclusion that the claimant tried to re-pierce patient X's nipple. The claimant did not use good judgment when she stayed in the room and took part in some inappropriate comments. As a result of claimant's poor judgment, she did not act in the best interests of the employer's code of conduct. Even though a physician did not indicate the patient's earrings could be put back into the patient's ears, the claimant sanitized the earnings before she put the earrings back in the patient X's ears. Even though Lopez would not have done this, the evidence does not establish the claimant's actions violate Iowa Code § 152.1(b). Since the earrings had been in the patient's ears, reinserting them did not require a physician's order.

While the employer discharged the claimant for business reasons, the claimant did not commit a current act of work-connected misconduct. In the alternative, the claimant demonstrated poor judgement on January 29, but she did not commit work-connected misconduct. As of March 25, 2012, the claimant is qualified to receive benefits.

DECISION:

The representative's April 20, 2012 determination (reference 01) is reversed. The employer discharged the claimant for business reasons, but the claimant did not commit any current act of work-connected misconduct. The claimant's conduct on January 29 does not rise to the level of work-connected misconduct. As of March 25, 2012, the claimant is qualified to receive benefits. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/kjw