

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KARLA K DEBAILLIE
Claimant

APPEAL NO. 07A-UI-03799-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

A PLUS HEALTH CARE SERVICES
Employer

**OC: 03/18/07 R: 04
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 9, 2007, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on May 24, 2007. Claimant participated and was represented by John Graupmann, Legal Assistant. Employer participated through Julie Redington and was represented by Candy Pastrnak, Attorney at Law. Claimant's Exhibits A through E were received. Employer's Exhibits 1 and 2 were received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a full time LPN from August 25, 2005 until March 20, 2007 when she was discharged for allegedly leaving a patient's (S.S., age 7) tracheotomy (trach) tube plugged all night without checking to see if it needed to be changed on February 26 through 27, 2007. The patient's mother told claimant upon her arrival at 11:30 p.m. that Spencer had vomited earlier in the evening and she had changed his trach tube. Claimant recorded in his flow sheet that, among other cares, checked the trach tube at least once each hour she was present and she toileted (suctioned abbreviated as sx) the trach upon her arrival. The next hour no suction was required since there was nothing in the trach, he had not coughed and there was no gurgling indicating the presence of material in the trach. She next suctioned between 1:00 a.m. and 2:00 a.m. and again between 3:00 a.m. and 4:00 a.m. She last examined the trach tube about 6:30 a.m. and there was not anything in his trach that required removal. (Claimant's Exhibit A) She also gave medications as ordered (including a nebulizer treatment ordered as needed), monitored his temperature, elevated his head, and provided comfort. She did not change the trach since she was only getting a small amount of white secretions (as opposed to colored, which may indicate infection) and she believed the labored breathing was due to material in his lungs and was not related to material in his trach. Claimant provided care to Spencer on about five additional shifts after February 26, 2007 and there were no complaints.

Case manager, Bev Lund, R.N. arrived at about 6:50 a.m. Claimant briefed her on the night and left for another assignment at 7:15 a.m. Lund did not change the trach tube during her shift either. It was Lund who made the accusation but waited until the week of the separation to report it to Redington. Lund did not participate in the hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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.

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).

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. 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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The patient flow sheet adequately establishes that claimant either suctioned or examined the trach tube every hour during her shift and made reasonable care decisions based upon the patient's condition and any secretions suctioned. Furthermore, since employer, including case manager Lund, waited to discharge claimant for three weeks, the act cannot be considered current. Claimant has also adequately rebutted employer's other allegations regarding the DVDs, the book and the food. Benefits are allowed.

DECISION:

The April 9, 2007, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css