

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LYNDA L KENNEALLY**  
Claimant

**APPEAL NO. 13A-UI-07758-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWAN HOME HEALTH LLC**  
Employer

**OC: 05/19/13**  
**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 18, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 9, 2013. Claimant Lynda Kenneally participated. Scott Rausch represented the employer. Exhibits One through 16 were received into evidence.

**ISSUE:**

Whether Ms. Kenneally was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Swan Home Health, L.L.C., operates Dubuque Retirement Community, an unlicensed retirement facility. Lynda Kenneally, R.N., was employed as a full-time Home Health Coordinator until May 17, 2013, when Shanna Braymen, R.N., Director of Swan Home Health, discharged her from the employment. Ms. Kenneally had started the employment as a Wellness Director, but had transitioned to the Home Health Coordinator position at the employer's request. Ms. Kenneally was the only nurse on staff at Dubuque Retirement Community. Ms. Kenneally supervised 22 to 25 medication assistants and patient support assistants. Ms. Kenneally routinely worked 10 to 14-hour workdays and was on-call when she was not at the workplace. Ms. Kenneally felt overwhelmed by the workload.

Three or four of the residents in Ms. Kenneally's care were diabetic and had standing orders for insulin. Staff would have to monitor the residents' blood glucose levels and report changes to the resident's physician. The physician would then order appropriate changes to insulin dosage or other appropriate changes in the resident's care. The physician's orders were supposed to be reduced to writing, either by a document signed by the doctor or by Ms. Kenneally, the nurse, transcribing the verbal order that she received personally from the physician. Ms. Kenneally's duty to transcribe and/or note new orders in an accurate and timely manner was part of the written Resident Safety & Medication Errors policy that Ms. Kenneally signed in January 2013. What sometimes happened was that the unlicensed staff would notify the doctor's office of the

change in the resident's status, the doctor would provide a verbal order for changes to the resident's care, and the Dubuque Retirement Community medication aide or patient support assistant would implement the change, with or without speaking to Ms. Kenneally. Ms. Braymen discovered the unauthorized procedure at the time she visited the facility between May 14 and 17, 2013. Ms. Braymen solicited statements from employees, included Ms. Kenneally. Some of the statements appeared to suggest that the practice of receiving doctor's orders without involving Ms. Kenneally was sanctioned by Ms. Kenneally. Others, including Ms. Kenneally's statement, indicated otherwise. Ms. Braymen discharged Ms. Kenneally for allowing the unauthorized procedure. In making the decision to discharge Ms. Kenneally from the employment, the employer considered earlier concerns.

#### **REASONING AND CONCLUSIONS OF LAW:**

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s) alone. The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer did not present testimony from any person with personal knowledge of the conduct that triggered the discharge. The employer had the ability to present testimony from one or more employees with personal knowledge of the matters that factored in the discharge. The employer elected not to present such testimony. The unsworn statements that the employer presented both for the fact-finding interview and for the appeal hearing were insufficient to rebut Ms. Kenneally's testimony that she did not sanction the practice and that the practice was instead a natural result of insufficient nursing staff at the facility.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kenneally was discharged for no disqualifying reason. Accordingly, Ms. Kenneally is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

**DECISION:**

The agency representative's June 18, 2013, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

---

James E. Timberland  
Administrative Law Judge

---

Decision Dated and Mailed

jet/pjs