

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NICOLE M DURAN-HARFORD
Claimant

APPEAL NO. 23A-UI-08698-JT-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

GENESIS HEALTH SYSTEM
Employer

**OC: 07/30/23
Claimant: Appellant (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge

STATEMENT OF THE CASE:

On September 11, 2023, Nicole Duran-Harford (claimant) filed a timely appeal from the August 30, 2023 (reference 01) decision that disqualified the claimant for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that the claimant was discharged on August 1, 2023 for insubordination in connection with the employment. After due notice was issued, a hearing was held on September 27, 2023. Claimant participated. Allison Hamilton represented the employer and presented additional testimony through Tammy Kadlek. Exhibits A and B were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Nicole Duran-Harford (claimant) was employed by Genesis Health System as a near full-time (.85 FTE) Clinical Assistant (CA) from June 2021 until August 1, 2023, when the employer discharged her from the employment for alleged insubordination. The claimant worked in the Emergency Department. The claimant worked the overnight shift, usually from 7:00 p.m. to 7:00 a.m. The claimant's regular duties included assisting patients with activities of daily living, cleaning rooms, assisting with blood draws, EKGs, patient vitals, and other tasks as delegated by the nursing staff or a medical provider. Emergency Department Nurse Supervisor Lauren Lovedy was the claimant's immediate supervisor. Nurse Lovedy reports to Nurse Manager Allison Hamilton, who made the decision to discharge the claimant from the employment. During each shift, the claimant would be assigned to assist in one or more designated Emergency Department "zones." The employer has no established procedure for "floating" the CA's from one zone to another.

At the scheduled start of the claimant's July 31, 2023 shift, the claimant entered the Emergency Department through the patient waiting room and overheard patients complaining about how long they had been waiting. The claimant reported to the charge nurse to receive her shift zone

assignment. The charge nurse assigned the claimant to work the “resource” position until 9:00 p.m. and to thereafter assist with triage. The resource duties included assisting with EKGs, switching rooms, and stocking supplies.

In anticipation of spending most of her shift, 9:00 p.m. onward, in the triage area, the claimant went to the triage area to drop off her book bag and water jug.

When the claimant entered the triage area, Jessical Ramsey, R.N., asked the claimant whether she was assigned to triage. The claimant answered that she would not be in the triage area until 9:00 p.m. and was at that time the resource Clinical Assistant (CA). The claimant repeated a running Emergency Department inside joke and stated, “So that means I am going to sit on my ass and not do shit.” At that time, Nurse Ramsey said triage could use the claimant as Front CA. The Emergency Department had just recently created the position of Front CA and had distributed to the nursing staff a list of CA’s who had undergone training specific to the Front CA duties. The claimant had not been selected for the training and was not on the list. Alexis Hughes, the Front CA who was coming off her shift, attempted to explain the Front CA duties to the claimant. The duties included taking patient vitals and performing a sort of pre-triage triage to determine whether individual patients were experiencing physical distress that required intervention and assistance while they waited for the triage nurse. Nurse Ramsey told the claimant that the claimant would be stationed in the waiting room to perform the Front CA duties. The claimant stated, “I’m not going out there.” The claimant’s comment was based in part on her observation that patients were unhappy and restless about waiting times. The claimant’s comment was also based on her concern that she was not qualified to triage patients and that asking her to do so created a potentially unsafe situation for patients. Ms. Hughes told the claimant there was a book that tells the Front CA what to do. The claimant briefly perused the contents of the book and commented that the book was “useless.” That utterance did not sit well with Nurse Ramsey. The claimant stated that they had differing opinions and further stated, “I’m not doing this,” by which the claimant meant she was not going to argue. Nurse Ramsey interpreted the utterance as an insubordinate refusal to comply with a directive. The claimant reported to her “resource” duties and later reported to her triage duties at 9:00 p.m.

The claimant’s exchange with Nurse Ramsey was recorded through audio and visual surveillance. The employer reviewed the surveillance record. Though the surveillance record does not include confidential patient information, the employer did not submit the surveillance record for the unemployment insurance appeal hearing.

Under the employer’s written policies, insubordination can lead to immediate discharge from the employment. The claimant received the handbook containing the policy and was aware of the policy.

The only prior incident the employer considered when making the discharge decision concerned the claimant’s refusal of a CA assignment on May 26, 2023. In that instance, the charge nurse assigned the claimant to stay with a group of four behavioral health patients who were waiting for in-patient psychiatric beds and to stay with them for the duration of her 12-hour shift. The claimant had been assigned to stay with behavioral health patients in the past, but never for an entire shift. The claimant verbally refused the assignment and then exited the Emergency Department. After a moment, the claimant returned and worked the previously assigned behavioral health duties without letter the charge nurse know that she had reentered the emergency department. The employer did not formally discipline the claimant in connection with the incident. Instead, the employer directed the charge nurse to take staff preferences into consideration when assigning CA duties.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) and (d) provides as follows:

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 disqualification shall continue 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.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

...

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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 a 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. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(6) Conduct that substantially and unjustifiably endangers the personal safety of coworkers or the general public.

...

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). 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 Iowa Administrative Code rule 871-24.32(4).

Continued failure to follow reasonable instructions constitutes misconduct. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). In *Gilliam v. Atlantic Bottling Company*, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990).

The evidence in the record establishes a discharge for no disqualifying reason. The evidence indicates that in both instances the employer took into consideration, the employer directive was unreasonable. The employer recognized the unreasonableness of the May 26 assignment and addressed the supervising nurse about that matter. In the final incident, the nursing staff sprung on the claimant an assignment for which the claimant had not been trained. In the final incident, the claimant’s refusal was reasonable under the totality of the circumstances, though the language of the refusal lacked tact. In the earlier incident, the claimant actually acquiesced in the assignment after a giving an initial refusal. The evidence fails to establish a pattern or unreasonable refusal of reasonable employer directives and fails to establish a “current act” of misconduct. The administrative law judge notes the employer elected not to present testimony from any of the parties directly involved in the final incident and elected not to provide the audio/video surveillance record despite that record not containing confidential patient information. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer’s account may be charged for benefits.

DECISION:

The August 30, 2023 (reference 01) decision is REVERSED. The claimant was discharged on August 1, 2023 for no disqualifying reason. The claimant is eligible for benefits, provided the claimant is otherwise eligible. The employer's account may be charged for benefits.

A rectangular box containing a handwritten signature in cursive script that reads "James E. Timberland".

James E. Timberland
Administrative Law Judge

October 3, 2023
Decision Dated and Mailed

JET/jkb

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.