

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

---

KAY E SMITH

Claimant,

and

CARE INITIATIVES

Employer.

:  
:  
:  
:  
:  
:  
:  
:

HEARING NUMBER: 07B-UI-08484

EMPLOYMENT APPEAL BOARD  
DECISION

N O T I C E

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5-2-a**

D E C I S I O N

**UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE**

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board with one member concurring, one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

---

John A. Peno

AMG/fnv

## CONCURRING OPINION OF ELIZABETH L. SEISER:

I agree with my fellow board member that the administrative law judge's decision should be affirmed; however, I would also comment that the facts in this case underscore the challenges a care facility and its staff face handling multiple, sometimes competing, demands among regulatory standards, patient/family directives, staffing exigencies, and accepted practices at the facility.

Here, the claimant, a licensed practical nurse (LPN), was discharged for asking an allegedly unauthorized staff member, a certified nurse's aide (CNA), to cut a patient's ingrown toenail. The CNA in question appeared as one of the claimant's witnesses. Both she and the claimant credibly testified that the CNA (who had some kind of nail technician certification) had regularly treated clients' ingrown toenails at the facility for the past two years and had been authorized by the facility's administrator to do so. The claimant was present during the treatment procedure and had started charting it when she was called away to the other side of the unit to assist another nurse in handling another patient's death. The claimant asked the CNA to finish charting the nail care. The claimant should have charted the procedure herself; however, this omission appears to be an isolated act of poor performance under mitigating circumstances.

In deciding to discharge the claimant, the employer also cites a March 2007 written warning to the claimant from her supervisor, the Director of Nursing (DON), for failing to secure a doctor's order in conjunction with a recommendation from a speech therapist regarding a patient's feeding orders. In that instance, the claimant encountered a family care directive that conflicted with the speech therapist's recommendation; the patient's daughter appeared as a witness for the claimant to corroborate the family directive and conflict in question. The claimant dealt with the conflict by, appropriately, asking the DON to get involved and resolve the conflict before she obtained a doctor's order. The DON issued a written warning to the claimant, alleging that the claimant failed to follow through; but after conferring with the patient's family members, the DON apparently concurred that the claimant was correct in holding off on getting the order. The DON apologized to the claimant for the warning. The DON is no longer an employee of the facility and did not testify at the hearing. The same day the claimant was discharged, the DON turned in her notice of resignation and subsequently left employment.

For the reasons above I do not believe the employer has met its burden of proof in establishing misconduct sufficient to warrant the denial of unemployment compensation benefits.

---

Elizabeth L. Seiser

**DISSENTING OPINION OF MARY ANN SPICER:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. Ms. Smith was a full-time LPN who functioned as a staff nurse. She failed to conduct an assessment of a patient's condition prior to calling in a CNA who was not certified by the facility to perform the ingrown toenail procedure. According to the employer's policy, only a licensed nurse, podiatrist or doctor could perform the aforementioned procedure. (Tr. 3, lines 8-17) Ms. Smith's failure to follow the employer's policy created a liability for the facility in that the Department of Inspections and Appeals issued a citation finding the facility guilty of having unqualified staff performing resident care. (Tr. 6, lines 22-24; Tr. 30, lines 25- 34)

The claimant's witness through her own admission stated she was a licensed technician and had no statutory authority to trim nails at Care Initiatives. (Tr. 28, lines 11-13) At issue is whether Ms. Smith gave permission to an unauthorized person to conduct an ingrown toenail procedure and whether Ms. Smith violated the last chance agreement for failing to properly follow the facility's procedures. The claimant admitted that she did not chart the assessment nor talk to the doctor; she later changed her statement, which impugns her credibility. (Tr. 21, lines 9- 14; Tr. 23, lines 23- 32) Ms. Smith's refusal to follow policy procedure was a willful and wanton disregard for the employer's interest. See, Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). A reasonable person would consider Ms. Smith's 30 years of experience and her indirect answers to what actually occurred as a an attempt to lessen the negative impact of her deliberate failure to carry out her duties as an LPN. Thus, I would reverse the Administrative Law Judge and deny all benefits.

---

Mary Ann Spicer

AMG/fnv