

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DANYELL M FREEMAN**  
Claimant

**APPEAL NO. 16A-UI-10541-JT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 08/28/16**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Danyell Freeman filed a timely appeal from the September 20, 2016, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on an agency conclusion that Ms. Freeman was discharged on August 29, 2016 for misconduct in connection with the employment. Ms. Freeman requested an in-person hearing. After due notice was issued, an in-person hearing was held on October 24, 2016 at the Fort Dodge Workforce Development Center. Ms. Freeman participated. Alyce Smolsky of Equifax represented the employer and presented testimony through Alec Steils, Jaclyn Berhow, Tessa Angstrom, Kim Scherff, Amanda Coen, and Jody Head. Exhibits 1 through 4, C through G, I, J and K were received into evidence.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Danyell Freeman was employed by Care Initiatives, d/b/a Stratford Specialty Care, as a full-time Licensed Practice Nurse and charge nurse from April 2015 until August 29, 2016, when Alec Steils, Administrator, and Jaclyn Berhow, Director of Nursing, discharged her from the employment. Ms. Berhow was Ms. Freeman's immediate supervisor. Ms. Freeman's regular shift was 3:00 p.m. to 3:00 a.m. Ms. Freeman sometimes worked 16-hour shifts. Ms. Freeman worked at least four to seven shifts per week. Toward the end of the employment, the employer was understaffed with nurses and Ms. Freeman routinely worked six or seven shifts per week. Ms. Freeman would routinely be the only nurse on duty during the overnight shift. Due to her duties and workload, Ms. Freeman was often unable to step away to take formal breaks and would instead take her breaks at the nurses' station.

The employer cites a number of concerns as the premise for discharging Ms. Freeman from the employment. One of the triggering concerns was Ms. Freeman's use of her personal cell phone to contact the Director of Nursing, Jacklyn Berhow, during Ms. Freeman's shift on August 27,

2016. Ms. Berhow became the Director of Nursing on July 14, 2016 and became Ms. Freeman's supervisor at that time. Prior to that, Ms. Berhow had been an employee of Care Initiatives, but had been away from Stratford Specialty Care for five years. The employer has a personal property policy that prohibits use of personal cell phones while on duty unless the use is related to company business or during breaks. Ms. Freeman and her prior supervisor had routinely communicated during work hours via personal cell phone. Ms. Freeman's call to Ms. Berhow at 4:20 p.m. on August 27, 2016 was work-related. Ms. Berhow was away from the workplace. Ms. Freeman wished to speak with Ms. Berhow about Ms. Freeman's concern that she had been passed over for a dayshift opening. Ms. Freeman did not reach Ms. Berhow as part of the attempted call on August 27. Ms. Freeman was not on break at the time of the call.

Other aspects of the August 27, 2016 phone call factored in the employer's decision to end Ms. Freeman's employment. Prior to Ms. Freeman's attempt to reach Ms. Berhow, Ms. Freeman recruited another employee, Amanda Coen, to function as a witness during Ms. Freeman's telephone call with Ms. Berhow. Ms. Coen is a Certified Nursing Assistant at Stratford Specialty Care. At the time Ms. Freeman summoned Ms. Coen to function as a witness to the call, Ms. Freeman, as charge nurse, was Ms. Coen's immediate supervisor. Ms. Freeman did not tell Ms. Coen the purpose of the call until after Ms. Freeman's failed to reach Ms. Berhow. Only then did Ms. Freeman reveal to Ms. Coen that she had wanted to speak with Ms. Freeman regarding her belief that she had been passed over for the day nursing position. At the time of the call, Ms. Coen was supposed to be getting residents ready for the evening meal. Before Ms. Freeman made the call, Ms. Freeman told Ms. Coen that she wished there was some way to record the call. Ms. Coen replied that she thought there was probably a software application that Ms. Freeman could download that would allow her to record the call. Despite this contribution, Ms. Coen felt uncomfortable with being included on the call. After Ms. Freeman's failed attempt to reach Ms. Berhow, Ms. Coen called Alec Steils. Mr. Steils joined Stratford Specialty Care as Administrator in June 2016. Ms. Coen told Mr. Steils that she felt uncomfortable about being included in the call and had felt she had no choice. Mr. Steils directed Ms. Coen not to do anything that made her feel uncomfortable. It was after the contact with Mr. Steils that Ms. Freeman disclosed the purpose of the call. Ms. Coen then called Mr. Steils a second time to tell him the purpose of the Ms. Freeman's call to Ms. Berhow. Mr. Steils then contacted Ms. Berhow and advised her not to answer Ms. Freeman's call.

While Ms. Freeman's telephone call, or the attempted telephone call, to Ms. Berhow was the primary basis for the discharge, Ms. Berhow and Mr. Steils looked for other offending conduct to support their decision to discharge Ms. Freeman from the employment. On August 28, Ms. Berhow perused a Facebook page entitled "Show Me Your Stethoscope" that functioned as a sounding board for nurses and noted posts that Ms. Freeman had made to the Facebook page on August 2. Ms. Berhow and Ms. Freeman were both members of the closed group Facebook page. Ms. Freeman made her first August 2 post prior to the start of her shift. That post was about Ms. Freeman's newborn grandson's health condition. At 6:33 p.m., Ms. Freeman made another post to the Facebook page via her personal cell phone and while she was at the nurses' station at work. This second post was about how much Ms. Freeman appreciated the Facebook page for nurses. Ms. Freeman was on an informal break at the time she made this second post. Ms. Freeman included a photo of herself in the post. Ms. Freeman took the photo at the nurses' station. The photo showed Ms. Freeman in her nursing uniform with a stethoscope draped around her neck in typical fashion. Other members of the particular Facebook page had posted similar photos. Ms. Freeman's photo did not show any resident, any other staff member. The photo did not include any display of confidential workplace information. The employer has a social media policy that prohibited employees from using the employer's computers to access social networking or social media sites without prior written permission. The policy did not prohibit employees from accessing such sites via personal

devices. Indeed, the policy restricted employees to using such personal devices to access such sites. Though Ms. Freeman's access to the Facebook page did not in fact violate the employer's written social media policy, the employer nonetheless deemed it a violation of the social media policy. The employer's written personal property policy indicated that, "use of any personal cameras, camera phones or other imaging devices is strictly prohibited at all times," the employer did not enforce that policy. On the contrary, employees routinely posted photos to Facebook from the workplace with the employer's knowledge that they were doing so. Those other posted photos, like Ms. Freeman's photo, did not include residents or disclosure of any confidential information.

The employer points to one other matter as a factor in the employer's decision to discharge Ms. Freeman from the employment. On August 26, Mr. Steils directed Ms. Freeman to complete a "time study" of the work she performed during her shift so that the employer could further scrutinize overtime pay issues. Mr. Steils held a brief meeting to discuss his expectations and provided Ms. Freeman with a form to use to provide cursory documentation every half hour of the work she had performed during that 30-minute period. During the first couple days, Ms. Freeman used a different form that broke down the time increments into 15-minute intervals. Ms. Freeman then provided more information than had been requested. On at least one of the days, Ms. Freeman became overwhelmed by her regular duties and the added duty of providing additional documentation of the work she had performed. Ms. Freeman submitted the completed forms by returning them to Mr. Steils. However, Mr. Steils' initial instruction had been to return the completed forms to the Director of Nursing. Mr. Steils deemed Ms. Freeman's use of the 15-minute for two days, her act of providing more detailed information than requested, and her return of the forms to him instead of Ms. Berhow to be acts of insubordination.

Prior to June 2016, the employer had not issued any reprimands to Ms. Freeman. In May 2016, Ms. Freeman had spoken to the spouse of a patient/resident about a physician assistant yelling at the patient/resident. Ms. Freeman had not observed the conduct. A coworker had told Ms. Freeman about the conduct. On June 3, 2016, one or more state investigators went to Stratford Specialty Care as part of their investigation into alleged dependent adult abuse. The employer thereafter issued two reprimands to Ms. Freeman during the month of June. On June 8, 2016, the employer reprimanded Ms. Freeman for allegedly failing to adhere to professional boundaries by discussing staffing or other workplace issues with a resident or a resident's family. On June 20, 2016, the employer issued a second reprimand to Ms. Freeman allegedly using a vulgar term in reference to another employee. However, at the end of that same month, the employer also named Ms. Freeman "Employee of the Month" and provided her with a certificate recognizing her "outstanding dedication to Resident and Staff at Stratford Specialty Care." Ms. Freeman perceives a connection between the state's investigation of the alleged dependent adult abuse issue and the employer's decision thereafter to discipline her and discharge her from the employment.

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

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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 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).

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).

The weight of the evidence in the record fails to establish misconduct in connection with the employment that would disqualify Ms. Freeman for unemployment insurance benefits. The evidence indicates that Ms. Freeman performed her work duties in good faith and that she at no time acted in a manner indicating a willful or wanton disregard of the employer's interests. The weight of the evidence establishes that Ms. Freeman went well above and beyond what a reasonable employer would expect of an employee by working 12 to 16-hour shifts upwards of seven days per week, while the employer experienced a shortage of nurses and substantial turnover in management staff. Despite the obviously onerous workload, Mr. Steils elected to add to that workload by directing Ms. Freeman to complete a "time study." The weight of the evidence establishes that Mr. Steils provided cursory directions and that Ms. Freeman then acted in good faith to comply by going over and above what was expected in completing the time study. There was no insubordination in connection with the time study.

Ms. Freeman exercised poor judgment when she enlisted Ms. Coen to act as a witness to the conversation she intended to have with her new Director of Nursing regarding why Ms. Freeman had been passed over for the day nurse position. The suggestion that Ms. Freeman download an application to record the conversation came from Ms. Coen. There is no indication that Ms. Freeman ever went through with recording a discussion with her supervisor. However, the employer fixated on that event and then looked for other bases to support discharging Ms. Freeman from the employment. The weight of the evidence establishes no knowing and intentional violation of employer work rules through possession and use of the personal cell phone in light of the ongoing workplace precedent. The weight of the evidence establishes no knowing and intentional violation of employer work rules in connection with the innocuous photo posted to Facebook.

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

**DECISION:**

The September 20, 2016, reference 01, decision is reversed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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