

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

KAREN K JOHNSON  
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CARE INITIATIVES  
c/o TALX UC EXPRESS  
f/n/a JOHNSON & ASSOCIATES  
P O BOX 6007  
OMAHA NE 68106-6007

Appeal Number: 04A-UI-03408-DT  
OC: 02/29/04 R: 01  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319.**

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Karen K. Johnson (claimant) appealed a representative's March 22, 2004 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Care Initiatives (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 22, 2004. The claimant participated in the hearing. Lynn Corbeil of TALX UC Express, f/n/a Johnson & Associates, appeared on the employer's behalf and presented testimony from three witnesses, Wendy Nelson, Pat Heibult, and Ann Dose. During the hearing, Employer's Exhibits One through Six were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on July 20, 1999. She worked part time (32 hours per week) as a registered nurse/charge nurse in the employer's Sibley, Iowa long-term care nursing facility. Her last day of work was February 28, 2004. The employer discharged her on that date. The reason asserted for the discharge was the claimant's failure to do a skin assessment on a resident on February 23.

On February 23 the claimant was working a 2:00 a.m. to 2:00 p.m. shift. Going into the shift, her duty assignment included doing the weekly skin assessment on a resident who had had sores on both her heel and toe. The nurse from whom the claimant took over had reported to the claimant that the toe was healing but that the heel was still open. The claimant passed this information along at the morning Q/A meeting prior to checking the resident herself. She was occupied with other matters and had not attended to doing the skin assessment by the time another rotation of nurses came on at 6:00 a.m. Ms. Heibult was one of those nurses. The claimant did discuss the resident's skin sores with Ms. Heibult. The claimant sought to convey to Ms. Heibult that the toe was healed but the heel still needed attention and that the skin assessment had not yet been done. She understood that Ms. Heibult was agreeing to do the assessment, or would notify the claimant if she also did not have time before she left. Ms. Heibult recalls the claimant noting that the foot was healed, and does not recall a distinction being made between the toe and the heel. She did not believe she had agreed to take care of doing the skin assessment. She did not do the skin assessment, and did not leave word for the claimant that she had not done the assessment. When the claimant next reported for duty the next day, she did not follow up on the matter as since there was no message from Ms. Heibult, she believed that the assessment had been completed. While the employer was aware of the missed skin assessment at least by February 24, initially no action was taken to mitigate the missed skin assessment documentation, as the employer wanted to see if the claimant would discover the error and rectify it herself. Other staff ultimately completed the assessment on February 26.

The employer's discharge decision was almost exclusively based upon the seriousness of the February 23 incident alone. However, to a minor degree, the employer also noted that the claimant had been given a verbal warning on January 23, 2003 for leaving a medication cart unattended and administering a treatment at the nurses' station, and had been given a written warning on December 9, 2003 for leaving a used but shielded needle in a resident's room.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code

Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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.

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
  - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
  - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
  - a. Manifest equal culpability, wrongful intent or evil design; or
  - b. Show an intentional and substantial disregard of:
    1. The employer's interest, or

2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is the failure to perform the skin assessment as directed on February 23. The claimant's testimony that she had believed Ms. Heibult had accepted that assignment was credible. While Ms. Heibult does not recall the discussion the same way, she may have forgotten or misheard certain details of the conversation. The administrative law judge notes that Ms. Heibult has considerable incentive not to recall the discussion the same as the claimant; given that the claimant was discharged for in essence a single incident of failing to complete a skin assessment which had been delegated to her, Ms. Heibult could conceivably have faced the same consequence. Further, the seriousness of the documentation infraction as asserted by the employer is eroded by the fact the employer allowed the documentation omission to continue for several days after it knew that the documentation had not occurred as scheduled on February 23.

Nor do the claimant's prior disciplinary actions raise the claimant's actions on February 23 to a more serious level. The mere fact that an employee might have a few unrelated incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). Under the circumstances of this case, the claimant's failure to complete the skin assessment herself, and in the alternative her failure to ensure that the need to do the assessment was effectively communicated to and completed by someone else, was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 22, 2004 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/s