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

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Appeal Number: 06A-UI-00412-LT
OC: 12-04-05 R: 03
Claimant: Respondent (1)

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, 4th 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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Iowa Code §96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

Employer filed a timely appeal from the January 5, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 30, 2006. Claimant did participate and was represented by Lloyd Keith, Attorney at Law. Also called by claimant were Shary Wyldes, Carol Weber, and Kim Ware. Employer did participate through Tammy Cole, Amanda Smith, Dan Donahue, Kristin Wulff, and Connie Elswick. Employer was represented by Jessica Meyer of Johnson & Associates. Employer's Exhibits 2 through 5, and 7 through 9 were received. Employer's proposed Exhibits 1, 6 and 10 were not offered.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time LPN charge nurse through December 2, 2005 when she was

discharged. Tammy Cole DON and Dan Donahue, administrator, made the decision to discharge after housekeeping supervisor Kristin Wulff reported on November 30 that while cleaning the dining room she found medication in two cups of food on a resident Sarah's tray. One was pink potassium supplement and other white pill crushed into applesauce. Connie Elswick CNA saw Amanda Smith take the medication to claimant but neither made an observation as to whether the medication was administered. Carol Weber was working with claimant in the dining room at the time and heard many versions of the incident. If Wulff found the medications left on a tray, she should have reported it to nursing staff but Wulff did not raise any such issue to Weber that day. Rehabilitation aide Kim Ware was also working with residents in dining room at the same time and was not aware of any medication problems.

There were no prior documented medication errors. The only other warnings claimant received were related to documentation, assessment and intervention.

Claimant had recently reported Wulff to the main office for not providing clean washcloths to residents and staff resorted to using paper towels to wash residents. Wulff became upset with claimant and did not speak to her for a week. On Tuesday, November 29, employer told her that Wulff has supposedly found whole pills on a resident's nightstand on November 28. Claimant had instructed Wulff to dump them, and since the resident at issue, Stella, was not able to take whole pills, so there should have been no whole pills left.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

Inasmuch as Wulff had recently become disgruntled with claimant and had reported on November 28 that whole pills were left for a resident who could not take them, Wulff's bias is evident and her credibility is lacking as to the most recent allegation. Furthermore, with respect to the most recent incident, since Wulff did not report finding the medication on the date she supposedly found it as she should have; she was either lying or culpable for her own failure to act. While Elswick may have seen Smith take the medication to claimant, there was no other evidence other than from biased Wulff, that claimant did not give the medication to the resident.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to the separation. Inasmuch as this was an isolated incident and employer had not previously warned claimant about any other medication error issues, it has not met the burden of proof to establish that claimant acted deliberately or negligently on a repeated basis in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The January 5, 2006, reference 01, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/pjs