

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROBIN L KECK
Claimant

APPEAL NO. 08A-UI-08621-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 08/24/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated September 16, 2008, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 13, 2008. The claimant participated. The employer participated by Alice Smolsky, Hearing Representative, and witnesses, Louann Modlin and Melanie Mabry. Employer Exhibits One through Four were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for an intentional current act of misconduct in connection with his employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from September 26, 2006 until August 26, 2008 when he was discharged from employment. Mr. Keck held the position of Nurse Supervisor working third shift and was paid by the hour.

The claimant was discharged on August 26, 2008 for an incident that was alleged to have occurred on August 11, 2008. Mr. Keck had been suspended for a two-week period pending an investigation of alleged patient abuse. The allegation was found to be groundless, however, the employer decided to terminate the claimant based upon an allegation that had been made that he had failed to follow up on a nursing report instruction to check an unspecified number of residents for head lice. The claimant had been given in effect, an equivocal directive to check as many residents as could be accomplished during the third shift and that the remainder would be checked by the first shift staff. Mr. Keck believed that he was to check only staff members and did so. Under company policy an employee who has previously been given a serious warning is subject to discharge for a two-year period. When the patient abuse allegation was determined to be unfounded, Mr. Keck was discharged based upon information that had

previously been given to the employer that he had not complied with the directive to check other residents.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Keck was discharged for a current act of intentional misconduct. It does not.

The evidence in the record establishes the claimant was given in effect an equivocal instruction to check other residents if time allowed and told that the first shift staff would complete the check for remaining residents. Mr. Keck testified that it was his understanding that he was instructed to check staff members and did so.

The evidence in the record establishes that the individual who gave the claimant the directive to check for head lice gave that direction to the claimant on August 11, 2008 and reported the claimant's alleged failure within one to two days. The employer took no action to further investigate or to discharge the claimant between that date and August 26, 2008 as they were investigating another allegation against Mr. Keck and that allegation was determined to be unfounded. He was discharged based upon the previous allegation.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

For the reasons stated herein, the administrative law judge concludes that the evidence is not sufficient to establish intentional disqualifying misconduct on the part of the claimant. The administrative law judge also concludes that the claimant was discharged for a past act of misconduct that was not investigated or acted upon in a reasonable period of time after the alleged offense.

DECISION:

The representative's decision dated September 16, 2008, reference 01, is affirmed. The claimant was dismissed under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs