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: 05A-UI-00445-H2
OC: 12-12-04 R: 02
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, 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)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 6, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Des Moines, Iowa on February 15, 2005. The claimant did participate and was represented by Joseph. W. Fernandez, Attorney at Law. The employer did participate through (representative) Ron Robertson, Employee Relations Coordinator; Barb Casler, RNC Unit Director Child and Adolescent Center; and Aaron Hudson, Psychological Technician. Employer's Exhibit One was entered and received into the record. Claimant's Exhibits A through H were entered and received into the record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a nurse full time beginning July 3, 1995 through December 11, 2004 when she was discharged. The claimant was discharged for allegedly falsifying medical records and for allowing a non-nurse employee, Aaron Hudson, to administer medication to a patient. On December 7, 2004, a suppository was to be given to a patient who was being cared for by both the claimant and Mr. Hudson. At this time, Mr. Hudson was a fifth semester nursing student but was working as a psych technician not as a nurse or nursing student. The claimant took the medication off the cart and laid it and the supplies needed to administer it on a counter. Mr. Hudson walked by the counter and asked the claimant if "we" could give the medication now. Mr. Hudson picked up the supplies and walked down the hall toward the patient's room. The claimant did not follow him down to the patient's room. When he arrived at the patient's room, Mr. Hudson knew he would need assistance to administer the medication and he noticed another nurse, Sarah Stevens was in the room next door. Mr. Hudson asked Ms. Stevens to assist him while he administered the medication to the patient. Mr. Hudson then administered the medication to the patient. Ms. Stevens knew that Mr. Hudson was not a nurse yet she did not prohibit him from administering the medication and in fact watched and helped him administer the medication. The claimant charted in the MAR (medication administration record) that she had given the medication to the patient. As a result of the events, the claimant was discharged from her employment. Ms. Stevens and Mr. Hudson were given written disciplinary warnings.

The employer explains that Ms. Stevens and Mr. Hudson were not discharged because they had no prior disciplinary record. The only previous discipline on the claimant's record was a reprimand for being a no-call/no-show for one shift. The claimant did not know she was to work the shift she missed and she has no other disciplinary history for conduct similar to that for which she was discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the 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 employer discharged the claimant and has the burden of proof to show misconduct. 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).

The claimant contends that it was a common practice for the nurses to allow others to administer medications, notwithstanding the employer's policy to the contrary. This allegation is supported by the behavior of Ms. Stevens, another nurse who made no effort to stop Ms. Hudson from administering the medication. If it was in fact a strictly enforced policy that only nurses or doctors administer medication, then why did Ms. Stevens make no complaint or try to stop Mr. Hudson from administering the medication. Ms. Stevens' actions support the claimant's contentions of how medications were in fact administered on the floor.

The claimant also alleges that it was common practice for the MAR to be filled out prior to the medication being administered and then changed later if it was needed. The patient was not given any incorrect medication as a result of the claimant charting that she had in fact administered the medication when in fact Mr. Hudson administered it. The claimant filled out the MAR because she intended to give the medication to the patient until Mr. Hudson came by the counter and took the medication and supplies. The administrative law judge cannot conclude that there was an intent to deceive on the part of the claimant when she filled out the MAR.

Based on the testimony of Mr. Hudson and the claimant, the administrative law judge cannot conclude that the claimant gave Mr. Hudson permission to administer medication. It is more persuasive to believe that Mr. Hudson believed he was entitled to administer the medication so long as a nurse supervised him.

The discrepancy in punishment between Ms. Stevens and Mr. Hudson when compared to the termination of the claimant leads the administrative law judge to conclude that the claimant was

not treated as her coworkers were. If, as the employer alleges, it was such a serious violation to let someone other than a nurse or doctor administer medication, why was not Ms. Steven discharged for watching Mr. Hudson administer medication? The employer's disparate treatment of employees involved convinces the administrative law judge that the violation of the rules was not as serious as the employer alleges at hearing. In addition, the claimant's previous discipline for one missed shift is not in anyway connected to the current allegation of misconduct. The claimant was entitled to fair warning that the employer was no longer going to tolerate her performance and conduct. Without fair warning, the claimant had no way of knowing that there were changes she needed to make in order to preserve her employment. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 6, 2005, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/sc