

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NANCY A KELLEY**  
Claimant

**APPEAL NO: 10A-UI-14119-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALLEN MEMORIAL HOSPITAL**  
Employer

**OC: 09/12/10**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Nancy A. Kelley (claimant) appealed a representative's October 5, 2010 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Allen Memorial Hospital (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 29, 2010. This appeal was consolidated for hearing with one related appeal, 10A-UI-14118-DT. The claimant participated in the hearing and was represented by Lynn Smith, Attorney at Law. Steve Sesterhenn appeared on the employer's behalf. 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 7, 2010. Since at least 2005 she worked full time as an insurance case manager in the employer's mental health unit, as well as working PRN (*Pro re nata* – commonly used in medicine to mean "as needed") as a nurse in the unit, frequently working shifts on weekend days. Her last day of work was September 13, 2010. The employer discharged her on that date. The reason asserted for the discharge was a hygiene issue deemed to be a potential safety issue for other staff and patients.

The claimant had previously been verbally warned about some hygiene issues, including body odor issues; there had been no written warning issues, and the claimant did not recall any verbal warning in at least the last six months prior to her discharge. She had sought medical attention for the body odor issue, but she had not been advised her job was in jeopardy.

On August 21 the claimant was working as a nurse in the unit when her period began unexpectedly and heavily; when she stood up from having been sitting, she discovered a blood spot on the chair. She immediately took remedial action, including cleaning the chair, then for the remainder of the shift put a bed pad on the chair to protect it from any further accident. The

next day she was also working as a nurse in the unit and kept the bed pad on the chair to insure against any accidents that day. Another employee observed at least some of these occurrences, and complained to the employer. The employer did not discharge the claimant as a result of this incident until September 13. The claimant had been working virtually daily since August 22, but for September 9 through September 12.

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

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 § 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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the hygiene issue which arose on August 21. Misconduct connotes volition. Huntoon, supra. There is no evidence the claimant intentionally created a problem or failed to take appropriate action to remedy the problem. The claimant had not previously been warned that future occurrences could result in termination, in order to lay some groundwork for a finding of intent. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). Under the circumstances of this case, the situation which led to the claimant's discharge is more similar to a non-volitional health-related incident, which cannot constitute work-connected misconduct. Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007).

Further, there would be no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The incident in question occurred over three weeks prior to the employer's discharge of the claimant, and over two weeks had passed even by September 8, the last day the claimant worked before her final day. 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 October 5, 2010 decision (reference 02) 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.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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