

**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**

**MARK D UNGERER
20647 – 200TH ST
HAWKEYE IA 52147**

**ALLEN MEMORIAL HOSPITAL
ATTN PAYROLL
1825 LOGAN AVE
WATERLOO IA 50703**

**Appeal Number: 05A-UI-11278-CT
OC: 10/09/05 R: 04
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)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Allen Memorial Hospital filed an appeal from a representative's decision dated October 26, 2005, reference 01, which held that no disqualification would be imposed regarding Mark Ungerer's separation from employment. After due notice was issued, a hearing was held by telephone on November 17, 2005. Mr. Ungerer participated personally. The employer participated by Robin Elliott, Human Resources Manager; Mary Wells, Administrator; and Lynn Nieman, Director of Nursing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Ungerer was employed by Allen Memorial

Hospital from June 17, 2002 until October 7, 2005 as a full-time registered nurse. The decision to discharge him was based on complaints from September 23, 2005. On that date, Mr. Ungerer and Jennifer Riniker, an LPN, were with a hospice patient when Mr. Ungerer began giving him sips of orange juice containing medication. The patient's daughter and a friend were present at the time. The patient had been able to tolerate sips of the beverage earlier in the shift. When the patient began gurgling, Mr. Ungerer directed Ms. Riniker to get the suction machine. He did not refer to her by name but as "LPN." When he began the suctioning process, the daughter and friend left the room and went to the nurses' station. The daughter indicated to another nurse that she was uncomfortable with her father being given orange juice.

When Mr. Ungerer came out the nurses' station to get Atropine, he was asked by a nurse whether he got the orange juice out while suctioning. He responded that it was not orange juice but mucous and returned to the patient's room. The other nurse went with him to check on the patient's status for the daughter. She returned and advised the daughter that death was imminent. Mr. Ungerer put on the patient's call light with the intent of having the other nurse return to the room. However, the nurse returned with the family member and friend. Mr. Ungerer indicated that he only wanted the nurse to come to the room and not the family. The nurse insisted that they be allowed to remain given the fact that death was imminent.

Prior to September 23, 2005, Mr. Ungerer had received a written warning on April 14, 2005 because of his language on the floor and because he had made an obscene gesture towards a coworker. He had raised the index finger of his hand but later apologized to the coworker. On March 10, 2005, Mr. Ungerer received a written warning because a patient complained that he had shown a sexually explicit joke to an elderly patient. In December of 2004, he had been counseled regarding his job performance and his relationships with coworkers. It was felt he was creating tension among others. He was also advised that his language was not always appropriate for the setting.

On August 15, 2005, there was a complaint from a patient that Mr. Ungerer used unprofessional language and told a joke regarding oral sex when he treated her in the emergency room. The patient was there with her cousin and both had been consuming alcohol before arriving at the emergency room. Mr. Ungerer denied having used any inappropriate language or having told a sexual joke. The employer spoke with the doctor who had been in the room and he could not recall any inappropriate behavior.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Mr. Ungerer was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Before a disqualification may be imposed, the evidence must establish that the conduct that triggered the discharge constituted misconduct within the meaning of the law. In other words, there must be a current act of misconduct to sustain a disqualification from benefits. See 871 IAC 24.32(8).

After considering all of the evidence, the administrative law judge concludes that the employer has failed to establish that Mr. Ungerer engaged in misconduct on September 23, 2005. The employer did not allege that giving the patient orange juice was inappropriate or poor nursing practice. Although Ms. Riniker may have objected to being referred to as "LPN" rather than by name, Mr. Ungerer's conduct in that regard was not clearly inappropriate. When the nurse

responded to the call light in the patient's room and brought the family in, Mr. Ungerer indicated he did not ask to have the family back. Given the patient's imminent death, his statement reflected a lack of sensitivity to the fact that the family was running out of opportunities to say their final "good-byes." However, the statement was not so outrageous as to constitute an act of misconduct. Although Mr. Ungerer's behavior may have been unsatisfactory on September 23, it did not evince a willful or wanton disregard of the employer's standards. For the reasons stated herein, the administrative law judge concludes that the employer has failed to establish that the conduct on September 23, 2005 constituted misconduct within the meaning of the law.

Mr. Ungerer had engaged in acts of misconduct prior to September 23, 2005. However, the last event warranting discipline was in April of 2005. Although there was an allegation of inappropriate conduct from August 15, 2005, the evidence failed to establish that the patient's complaints were true and accurate. Moreover, even if the complaint was proved to be true, the incident would not represent a current act as it occurred almost two months prior to the discharge. Inasmuch as the employer has failed to establish that the incident on which the discharge was predicated constituted misconduct within the meaning of the law, the administrative law judge is not free to consider other, past acts of misconduct. Because the evidence failed to establish a current act of misconduct, no disqualification is imposed.

DECISION:

The representative's decision dated October 26, 2005, reference 01, is hereby affirmed. Mr. Ungerer was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

cfc/kjw