IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KATHY L FELDMANN
Claimant

VA CENTRAL IA HEALTHCARE
Employer

APPEAL NO. 09A-UCFE-00007-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/01/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

VA Central Iowa Healthcare (employer) appealed a representative's April 3, 2009 decision (reference 01) that concluded Kathy Feldmann (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 7, 2009. The claimant participated personally. The employer participated by Greg Smith, Human Resource Specialist, and Mary Tyrrel, Respiratory Therapy Supervisor. The employer offered and Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 7, 2004, as a full-time registered respiratory therapist. On December 3, 2008, the employer issued the claimant a written warning for tardiness that occurred in October 2008.

On December 9, 2008, the claimant started a patient on an inhaler treatment. She was called to a meeting in human resources with the respiratory therapy supervisor. The respiratory therapy supervisor did not arrange for another person to take over patient cares while the claimant was in the meeting. The claimant offered to go back and take care of the patient but the respiratory therapy supervisor told her it was not necessary. Four co-workers told the employer that the claimant did not turn her pager on or complete patient cares while she was at the meeting. The pagers frequently malfunctioned. The claimant's pager did not go off. The claimant completed all patient care that day.

On December 10, 2008, a patient with memory issues was alert and refused medication. Later the patient told a co-worker that he did not refuse medication. The co-worker reported to the employer that the claimant had refused to provide medication to the patient.

On December 17, 2008, the claimant's pager did not go off when a code blue was announced. When the claimant learned of the event, she proceeded directly to the call. A co-worker reported that the claimant did not have her pager on.

On December 26, 2008, the claimant offered a post-surgical patient a nebulizer treatment. The patient refused and the claimant recorded the refusal in the patient's medical records. The patient was heavily sedated. The claimant spoke with the patient's physician and the treatment orders were changed. On December 26, 2008, a co-worker told the employer that he talked to the patient and the patient said he did not refuse the nebulizer.

The claimant was on Family Medical Leave off and on from January 16 through 20, 2009. On January 20, 2009, the claimant performed work for the employer in the library. On January 26, 2009, the employer placed the claimant on authorized absence to investigate the events that occurred in December 2008. On February 10, 2009, the employer terminated the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

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 must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer provided final events occurring on December 9, 10, 17 and 26, 2009. These events occurred 31 to 48 days prior to the suspension. The claimant's behavior is too remote from the separation from employment by suspension to be considered final incidents. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's April 3, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css