

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

THERESA R BORCHERDING
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CEDAR FALLS IA 50613-5789

CARE INITIATIVES
c/o TALX
PO BOX 6007
OMAHA NE 68106-0007

Appeal Number: 06A-UI-06189-HT
OC: 05/21/06 R: 03
Claimant: Appellant (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

STATEMENT OF THE CASE:

The claimant, Theresa Borcharding, filed an appeal from a decision dated June 13, 2006, reference 01. The decision disqualified her from receiving unemployment benefits as she had been discharged for misconduct. After due notice was issued, a hearing was held by telephone conference call on July 6, 2006. The claimant participated on her own behalf. The employer, Care Initiatives, participated by Divisional Director Jerry Carley and was represented by TALX in the person of Jessica Meyer. Exhibits One, Two, Three, Four, Five and A were admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Theresa Borcharding was employed by Care Initiatives from August 18, 2003 until May 25, 2006. She was the full-time director of nursing (DON).

On May 18, 2006, the corporate compliance officer notified Division Director Jerry Carley that a complaint had come in on the anonymous hot line. It alleged Ms. Borcharding had instructed licensed practical nurses (LPN) in the facility to flush the intravenous lines of some of the residents and also to administer medications through the IV. This was against state law and company policies because only registered nurses (RN) were permitted to perform these functions.

Mr. Carley and the administrator, Allen Blakestead, interviewed LPNs in the facility on May 18, 19 and 24, 2006. Two of the LPNs acknowledged they had been instructed by Ms. Borcharding on at least five different occasions to perform these functions. Mr. Carley had interviewed the claimant at least twice and she admitted she had instructed the LPNs to do these procedures. She stated she felt since she had trained them and was available within the facility when the procedure was done, it was acceptable. However, she did admit this was a "gray area" within the law as to whether LPNs could do these procedures even with an RN's supervision.

Ms. Borcharding did not want to perform these procedures because she was pregnant and did not want to risk exposure to very contagious bacterial infections. She had not made her concerns known to the administrator or anyone else nor did she ask for help with those seriously ill patients, but took it upon herself to find this particular remedy.

The employer faced serious consequences if any harm had resulted to the resident from an unqualified person administering medications and performing the flushes of the IVs. Loss of license, fines or other sanctions and legal liability could have resulted. The decision was made to discharge the claimant and she was informed by phone by Mr. Blakestead.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 claimant was aware that the LPNs were not qualified or certified to perform the functions she had instructed them to do. Whatever her concerns may have been for her personal health, they do not justify violating the law and the company policies, especially as she had made no effort to try and resolve the matter with her supervisors. Her assertion that she "trained" the LPNs to do the procedure is unconvincing as there is no evidence she herself is qualified to do such training.

Her conduct exposed the employer to the possibility of sustaining serious legal and financial consequences should the matter result in injury to the resident. Ms. Borcharding took upon herself the training, instruction and direction of LPNs without authority, qualifications or permission. This is conduct not in the best interests of the employer and the claimant is disqualified.

Ms. Borcharding made the argument that nurse consultant Gina James was notified on April 26, 2006 that this inappropriate conduct had been going on and instructed the LPNs to cease and she would "look into it." It is apparent that this was not done and apparently the failure to act prompted the report to the compliance line which brought the matter to the appropriate personnel. Once the correct individuals had been advised of the problem, it was investigated and resolved.

DECISION:

The representative's decision of June 13, 2006, reference 01, is affirmed. Theresa Borcharding is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible.

bgh/cs