

**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**

**SUNNAH K MAMBU
1612 – 63RD ST
WINDSOR HEIGHTS IA 50322**

**MEDICAL STAFFING NETWORK INC
C/O EMPLOYERS UNITY INC
PO BOX 749000
ARVADA CO 80006-9000**

**Appeal Number: 05A-UI-04321-LT
OC: 04-03-05 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)

Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the April 18, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 16, 2005. Claimant did participate. Employer did participate through Jennifer Linder and was represented by Lucie Hengen of Employers Unity.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time CNA through January 26, 2005 when she was discharged after not accepting a night shift assignment. On January 2, 2005, claimant was injured at work when she was walking a 280-pound patient and he gave up walking and they fell to the floor. Claimant was unable to reach employer so Helen Antonio, a coworker, told her to go to the

emergency room. Later when claimant was able to contact employer, Arlene told her she could either continue to work or go to the emergency room.

Claimant was diagnosed with generalized back pain and referred to a general practice physician. Claimant called employer to tell them of the visit and recommendation and faxed them the information. Employer told claimant she would have to go to their designated doctor or they would not pay for the visit. However, it took from January 2 through 17, 2005 for employer to get claimant an appointment with its doctor. The doctor took her off work two weeks and ordered an MRI. The MRI revealed a disc hernia on L4 and L5 after two months of physical therapy ordered by employer's doctor. On January 26, 2005, claimant was released to work with restrictions of lifting no more than 5 to 10 pounds. The physician's office automatically faxed each appointment's information to employer.

Employer had work available to meet restrictions on the night shift (10:00 p.m. to 6:00 a.m.) but claimant could not accept that since she was taking medication that make her drowsy and she could not get childcare at the last minute for the night shift. Before the injury employer did not mandate that claimant work the night shift unless she could obtain childcare with short notice. Claimant's regular schedule (2:00 p.m. to 10:00 p.m.) did not include working nights (10:00 p.m. to 6:00 a.m.). Employer never offered claimant work on the 2:00 p.m. to 10:00 p.m. shift, nor did employer advise claimant that that shift might become available to her. Because of the timing of the shifts outside of regular business hours, conventional day care was not available and claimant relied upon her husband and family members.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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 issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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).

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Employer effectively discharged claimant by claiming she had quit after being unable to accept overnight shifts. Employer withheld information from claimant about the possibility of working her past regular shift. Linder testified she was not aware that claimant had childcare issues but later acknowledged the prior arrangement of not making claimant work night shifts on short notice when she could not arrange childcare. Accordingly, claimant's version of the events is credible and benefits are allowed.

DECISION:

The April 18, 2005, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

dml/sc