

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

LU ANN THOMAN

Claimant,

and

GENESIS HEALTH SYSTEM

Employer.

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HEARING NUMBER: 13B-UI-08418

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Lu Ann Thoman, worked for Genesis Health System from December 6, 1999 through June 25, 2013 as a part-time registered/charge nurse working close to full-time hours. (31:28-30:35) The Employer has a zero tolerance policy that prohibits the administration of medication to a patient without having a written order issued by a physician for the medication. (22:57-22:25; 22:53-22:47) Failure to do so is considered practicing outside the scope of nursing practices and is a reportable incident that is worthy of termination on the first offense. (5:15-5:06; 2:07-1:41)

On June 19th and the 20th, the Claimant was the on-duty charge nurse when the grad nurse reported that the latter's patient was experiencing increased pain. (16:55-16:48) Both nurses discussed the patient's pain issue for which the patient's chart contained an order to discontinue Lortab, which contained Tylenol. (25:45-25:33; 24:54-24:30; 24:07; 19:44; 16:41-16:31) Ms. Thoman did not see a discontinuation order for the Lortab. (16:37-15:56) The patient had been "...puking up the narcotic..." and the Claimant indicated to the grad nurse that it shouldn't be a problem obtaining a Tylenol order for the patient's fever. (19:19-) The nurse put out the call to the doctor for the order.

After a short while, Dr. Singh returned the call to which he provided the Tylenol order to Ms. Thoman by telephone about 5:00 a.m. (23:57; 19:55-19:48; 12:21; 18:53-18:48; 19:02-18:34) She did not immediately document the physician contact because she was called away for another patient. It was a very busy and chaotic night. (18:16-18:10) When the Claimant informed the grad nurse that she had the doctor's order (14:45-14:27), the nurse sought to retrieve it from the Omni cell, but it wasn't yet available. (12:02) The nurse then overrode the Omni cell to obtain the medication and gave it to the patient before the Claimant was able to document it (11:54; 11:06-10:30), which the Claimant was not aware of at the time. (9:55-9:28) Ms. Thoman later mistakenly documented the telephone order as being issued by Dr. Pyevich. (27:10-26:29; 23:27-23:19; 14:15) (Exhibit 1) About a half hour later, the nurse informed Ms. Thoman that the patient also had a fever. (15:38-15:30) The Claimant did not know of the patient's fever until after the medication had already been given to the patient.

The Employer questioned Ms. Thoman about the Tylenol incident (26:44), but did not contact the physician to determine whether or not the doctor had ever given the order for the Tylenol. (21:50-21:39) The Claimant did not follow up with the grad nurse's patient because there were several other patient's with more pressing medical issues going on, i.e., "...two patients in respiratory distress, we had another with no pulse in his feet after surgery..." (7:01-6:41) The Employer issued a 'Corrective Action Notice' to the Claimant on June 25, 2013 for "...practicing out of the scope of her nursing practice..." which meant that she didn't have authority to give meds without a written physician's order on the date at issue. (30:00-29:49; 20:10-20:00) She was terminated the same day.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The record establishes that the Claimant was a long-term employee of 13 years who had been a nurse for over 20 years. Ms. Thoman had knowledge of the Employer's zero tolerance policy, specifically, the prohibition of 'practicing outside the scope of the Iowa Nurse Practice Act', and admitted knowing that she could be terminated for practicing outside the scope of nursing practice for a first offense. (5:15-5:06) However, she denied writing a physician's order for a medication that was not authorized by a doctor. (19:55-19:48)

Here, the Claimant testified that based on the information she was given, she made contact with a doctor (Dr. Singh) who gave the Tylenol order by phone, which she relayed to the grad nurse. Although she admittedly did not immediately document the order by faxing it to the pharmacy, and even got the doctor's name incorrectly recorded, her behavior certainly did not amount to practicing outside the scope of practice. The Claimant provided credible testimony regarding the very busy work conditions on June 20th, which we find were mitigating circumstances. Although she argues that she, herself, did not administer the medication, much less without obtaining a doctor's order, she did document that the doctor's order, albeit, not immediately.

We note, however, that the burden is on the Employer to prove misconduct. Here, the Employer failed to provide a firsthand witness to corroborate their allegation. Additionally, the Employer admitted that they never contacted the doctor to corroborate or deny the Claimant's assertion that she did or did not obtain the order prior to obtaining the medicine based on the information the grad nurse gave her. According to her unrefuted testimony, it was the grad nurse who upon *not* finding the medication available in the Omni cell who overrode the system to obtain and administer it to the patient. At worst, Ms. Thoman is answerable for being unavailable to follow up with this patient; but again, there were other patients whose conditions required her more immediate attention. (7:01-6:41) This appears to have been an isolated instance of poor judgment, which again based on the circumstances, does not amount to job-disqualifying misconduct.

The Employer provided very few details as to the June 20th incident that triggered the Claimant's termination. (24:50-24:44) The Employer admitted that the Claimant did, in fact, obtain a physician's order, albeit not until 7:45 a.m. when it was faxed to the Pharmacy. (27:22-27:00) However, the Employer was unable to pinpoint when exactly the Claimant allegedly prescribed the medication in relation to when she received the doctor's order by telephone. (26:00-25:35) Nor could the Employer indicate when the order to discontinue giving the patient Lortab, which contains Tylenol, was received in relation to the new prescription. (24:56-24:28) Lastly, the Employer admitted that she never contacted the doctor to confirm or deny that he issued the order to Ms. Thoman, which could establish whether or not she was practicing outside the scope practice. Based on the facts of this record, we conclude that the Employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated August 26, 2013 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, the claimant is allowed benefits provided the Claimant is otherwise eligible.

John A. Peno

Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv