

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

PATRICIA A WELCH
1620 – 32ND ST NE
CEDAR RAPIDS IA 52402

CARE INITIATIVES
c/o JOHNSON & ASSOCIATES
PO BOX 68106-6007

Appeal Number: 05A-UI-04057-JTT
OC: 03/06/05 R: 03
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)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Patricia Welch filed a timely appeal from the April 4, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 6, 2005. Ms. Welch participated in the hearing. Dawn Fox of Johnson & Associates represented Care Initiatives and presented testimony through Barb Bernard, Director of Nursing, Renita Robertson, Certified Nursing Assistant, and Joyce Mayta, Certified Nursing Assistant. Exhibit One was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Patricia Welch was employed by Care Initiatives at Heritage Nursing and Rehabilitation in Cedar Rapids

from June 13, 2000 until March 7, 2005, when Barb Bernard, Director of Nursing, and Lanny Ward, Administrator, discharged her for misconduct. The nursing facility serves elderly residents suffering from dementia. Ms. Welch worked as a third-shift charge nurse and supervised the nursing assistants who monitored residents. Ms. Welch was the "float nurse," which meant she only worked on the floors in question when the two regular nurses were scheduled for a weekend off. She worked on the floors in question four nights every two weeks.

The final incident that prompted the discharge came to the attention of the employer on March 1. On that date, a representative of the Department of Inspections and Appeals was at the facility to investigate inappropriate conduct between two residents that occurred in February 2005. The Health Surveyor interviewed Ms. Welch. During the interview, Ms. Welch told the Health Surveyor that when the nursing assistant for "A Hall" would go on break, the nursing assistant for "B Hall" would close and secure the door to "B Hall" and take care of the residents on "A Hall." Residents suffering from end-stage dementia are housed on "A Hall." Residents suffering from earlier stages of dementia are housed on "B Hall" and are more active. Both "A Hall" and "B Hall" are secured units designed to keep the residents safe and prevent them from wandering off the unit. The Health Surveyor was concerned that the residents on "B Hall" were at times being left unattended and brought this information to the attention of the Director of Nursing, Barb Bernard.

Ms. Bernard and Lanny Ward, Administrator, then approached Ms. Welch regarding the matter. In response to Ms. Bernard's and Mr. Ward's questioning, Ms. Welch indicated that to her knowledge, "B Hall" was never left unattended with the door closed. Ms. Bernard and Mr. Ward had Ms. Welch draft a statement. In the statement, Ms. Welch indicated that "B Hall" had a nursing assistant present at all times, and that if the "A Hall" nursing assistant needed to go on break, the "B Hall" nursing assistant was to call the nurse's station to summon a staff member to cover "A Hall." On March 3, Ms. Bernard provided Ms. Welch's written statement to the Health Surveyor.

The Health Surveyor continued to be concerned and made arrangements with Ms. Bernard to re-interview Ms. Welch with Ms. Bernard present at the time of the interview. During this interview, Ms. Welch advised the Health Surveyor that if the "B Hall" nursing assistant is gone, the "A Hall" nursing assistant would sit in the hallway between the two halls, with the doors to both halls open. Ms. Welch further advised that if the "A Hall" nursing assistant needed to answer a call, light, or alarm while the "B Hall" nursing assistant is off the floor, the "A Hall" nursing assistant would shut the doors to "B Hall" long enough to call the nurses station for help.

Ms. Welch's second interview with the Health Surveyor did not resolve the Health Surveyor's concerns that residents were being left unattended. Ms. Bernard was not pleased with the changes in Ms. Welch's description of the nursing home's overnight practices or in either of the descriptions of the nursing home's overnight practices that Ms. Welch provided to the Health Surveyor.

According to Ms. Bernard, the doors to "B Hall" were to be secured at all times, and the staff was not allowed to prop open the door to "B Hall" and sit in a hallway outside the door. At break time, a nurse was to cover the resident halls while one nursing assistant ended then the other nursing assistant began. If another nursing assistant was available, that person could cover the resident halls during breaks.

The employer has an employee handbook that sets forth "Critical/Type A" violations that can be the basis for discharge. One such violation concerns "violating health and safety rules, including, but not limited to, infection control procedures, horseplay, unsafe conduct or unsafe acts, which jeopardize the health and safety of one's self or others or result in serious injury." Another such violation concerns "gross misconduct or intentional violation of any applicable regulatory standard or law." On June 13, 2000, Ms. Welch executed a written acknowledgment that she had received, reviewed, and understood the need to comply with the handbook.

Renita Robertson was a certified nursing assistant who worked with Ms. Welch as her charge nurse on the overnight shift. Ms. Robertson had spoken with Ms. Bernard in February after the incident involving the two residents and had provided a written statement regarding her actions from the start to the end of the shift during which the inappropriate contact between the residents took place. As part of that statement, Ms. Robertson indicated that she had propped open the doors to the resident hall and positioned herself in front of the open doors. After Ms. Bernard reviewed Ms. Robertson's statement, she had advised Ms. Robertson to no longer sit in the hallway with the doors to the resident hall propped open. Despite that directive, the next time Ms. Robertson worked with Ms. Welch as the charge nurse, Ms. Robertson again propped the door to "B Hall" open. Her reason for doing this was Ms. Welch's refusal to cover "A Hall" or "B Hall" during breaks. Ms. Robertson was concerned about disobeying the directive from Ms. Bernard and switched duties with another nursing assistant, so that she would no longer be the one to violate Ms. Bernard's directive.

At the time Mr. Ward and Ms. Bernard discharged Ms. Welch, Mr. Ward advised Ms. Welch that she was being terminated because she had cost the nursing home a lot of money. Ms. Bernard further indicated that Ms. Welch was being discharged for leaving the resident halls unattended. Ms. Welch believed she was being scapegoated for revealing to the Health Surveyor a practice that was in violation of the state regulations, but had been the accepted practice at the nursing home. It had been the practice through Ms. Welch's employment. One of the regular overnight charge nurses had inquired of Mr. Ward whether propping the doors to the resident halls was an acceptable practice and had been told it was. After Ms. Bernard's discussion with Ms. Robertson in February 2004, Ms. Bernard had been concerned about the practice of propping open the resident hall doors, but did not effectively communicate her position on the practice to the nurses on staff.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Welch was discharged for misconduct in connection with her employment.

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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record fails to establish that Ms. Welch was discharged for misconduct. The employer offered insufficient proof that Ms. Welch was aware of the state regulations that applied to the secured resident halls before the Health Surveyor interviewed her on March 1-5. The employer offered insufficient proof that Ms. Bernard or anyone else at the nursing home had communicated the appropriate information to Ms. Welch. Accordingly, the administrative law judge concludes that the employer has failed to meet its burden of proving that Ms. Welch willfully or wantonly disregarded the interests of the employer or standards of behavior the employer had the right to expect of her. See 871 IAC 24.32(1)(a). The administrative law judge concludes that Ms. Welch was discharged for no disqualifying reason. Accordingly, benefits are allowed, provided Ms. Welch is otherwise eligible.

DECISION:

The Agency representative's decision dated April 4, 2005, is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/s