

**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**

**JOLYNE M WALSH
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**CARDIOVASCULAR MEDICINE PC
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DAVENPORT IA 52803-2468**

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**Appeal Number: 05A-UI-02705-RT
OC: 02-06-05 R: 04
Claimant: Respondent (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 for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Cardiovascular Medicine PC, filed a timely appeal from an unemployment insurance decision dated March 7, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Jolyne M. Walsh. After due notice was issued, a telephone hearing was held on March 31, 2005 with the claimant participating. The claimant was represented by John F. Doak, Attorney at Law. Kristine Zeller, Administrator, and Michelle Smith, Nursing Supervisor, participated in the hearing for the employer. The employer was represented by Matthew P. Pappas, Attorney at Law. Employer's Exhibits 1 and 2 (Employer's Exhibit 2 admitted for the sole purpose of determining the credibility of the claimant) were admitted into

evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

At 2:35 p.m. on March 24, 2005, the administrative law judge called the claimant in response to a message from the claimant. The claimant requested a continuance to get an attorney. Because the claimant herself could be available for the hearing, the administrative law judge denied the continuance because the claimant had had sufficient time to get an attorney and an attorney was not necessary for the hearing, although the claimant was welcome to have one if she wished. The claimant did request that the documents in her file be sent to the employer and this was done. Prior to speaking to the claimant, the administrative law judge called the employer's attorney in regard to a continuance and then called the attorney back to indicate that there was not going to be a continuance.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits 1 and 2 (Employer's Exhibit 2 only for the purposes of determining the credibility of the claimant), the administrative law judge finds: The claimant was employed by the employer as a physician's nurse at the employer's location in Davenport, Iowa, from July 22, 2002 until she was forced to resign or be discharged on February 1, 2005. The reason for the choice between resignation or discharge was because of behavioral issues arising out of an incident on January 28, 2005 and because of alleged performance issues.

On January 28, 2005, the claimant had a verbal confrontation with a coworker, Kristina Litz. Ms. Litz is a medical assistant (MA) whose function is to get patients and take them to examining rooms and to get vital signs from the patients and then escort the patients back to the waiting room. A nurse's primary job is to assist the physician. The claimant was attempting to locate an MA and was unable to do so. The claimant contacted the supervisor of the MAs, about the availability of an MA. The claimant was upset because she could not find an MA and Ms. Litz was upset because she believed that the claimant was angry because no MA was available. In any event, the two engaged in a verbal confrontation. Neither one used profanity and no physical contact occurred. There were no patients in the vicinity. Later that day, January 28, 2005, when the claimant was discussing this matter with her supervisor, Michelle Smith, Nursing Supervisor, she apologized for losing her temper because she did not wish to do so. The claimant had previously received a verbal warning with a written record as shown at Employer's Exhibit 1. The claimant did commit the matters alleged in Employer's Exhibit 1 with the exception of number 7 which is crossed out and for which the claimant was not at fault and there was really no argument concerning number 2 between the claimant and Ms. Litz. The claimant received no warnings or disciplines of any kind between July 8, 2004 and January 28, 2005 when the confrontation occurred that gave rise to the claimant's forced resignation.

The employer also alleged that the claimant was forced to resign because of performance issues inasmuch as she failed to schedule certain procedures for patients and failed to call patients with test results. The claimant did not fail to schedule procedures but may have failed to call patients. When she failed to call a patient, it was because the test results were being held by her physician. The claimant had been working acceptably until approximately October 2004 when her performance allegedly began to slip. During this period of time, the claimant was denied at least some of the support staff that she needed and requested. Pursuant to her claim for unemployment insurance benefits filed effective February 6, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,480.00 as follows:

\$310.00 per week for eight weeks from benefit week ending February 12, 2005 to benefit week ending April 2, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not.

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).

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

The parties agree, and the administrative law judge concludes, that the claimant was compelled to resign on or effective February 1, 2005 or be discharged. Such a choice is not considered a voluntary leaving but a discharge. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witnesses testified that the claimant was discharged for two reasons, the verbal confrontation with a coworker on January 28, 2005, following a verbal warning with a written record for similar behavior on July 8, 2004 and because of performance issues.

Concerning the confrontation, the administrative law judge does find that a verbal confrontation occurred between the claimant and a coworker, Kristina Litz, Medical Assistant (MA). There was no profanity used and it was merely a verbal confrontation where both individuals raised their voices. There was also no physical contact. The administrative law judge concludes that the claimant was not the instigator. The claimant testified that she did not instigate the confrontation but, rather, it was instigated by Ms. Litz. The employer's witness, Michelle Smith, Nursing Supervisor, testified that the claimant instigated the confrontation. However, the testimony of Ms. Smith was hearsay. The administrative law judge concludes that the hearsay evidence of Ms. Smith does not outweigh that of the claimant. However, the administrative law judge does note that the claimant's credibility is shaken substantially by Employer's Exhibit 2. However, the administrative law judge also notes that the credibility of Ms. Smith was also substantially shaken by her insistence that the various categories of disciplines on Employer's Exhibit 2 did not necessarily indicate severity. At one point in her testimony, she started to say that a written warning was selected because the employer did not want to be severe with the claimant but later repudiated this. Her credibility was also questioned when she maintained that the claimant's performance matters were willful or deliberate but could offer no evidence to that effect other than to testify that it was willful and deliberate because the claimant admitted that she was not doing her job. Such an admission does not indicate, necessarily, willful or deliberate behavior. Accordingly, the administrative law judge concludes that the claimant's testimony, however shaken her credibility, is not outweighed by the hearsay testimony of Ms. Smith. The administrative law judge specifically notes that the claimant had received no warnings or disciplines since July 8, 2004. The incident occurring on January 28, 2005, that gave rise to the claimant's forced resignation, occurred over six months after the claimant's warning which was nothing more than a verbal warning with a written record. The administrative law judge also notes that the behaviors set out in Employer's Exhibit 1 do not really indicate substantial insubordination or inappropriate conduct. Accordingly, the administrative law judge is constrained to conclude, although it is a close question, that the employer has not demonstrated by a preponderance of the evidence that the incident on

January 28, 2005, was a deliberate act or omission constituting a material breach of her duties and obligations arising out of her worker's contract of employment or that it evinced a willful or wanton disregard of the employer's interests or that it was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

Concerning the performance matters, there is no real substantial evidence that the claimant's alleged performance issues were willful or deliberate. The claimant was accused by the employer of not scheduling procedures for patients and not calling patients with test results. The claimant denied that she failed to schedule procedures but conceded that she may have failed to call patients with test results but because the doctor held the test results. The only evidence of willful or deliberate behavior here was that the claimant informed Ms. Smith that she was not performing her job. As noted above, the administrative law judge does not believe that this establishes willful or deliberate conduct. There were no warnings to the claimant concerning her performance so as to establish recurring carelessness or negligence. Accordingly, although it is a close question, the administrative law judge concludes that the claimant's performance issues are not deliberate acts or omissions constituting a material breach of her duties and obligations arising out of her worker's contract of employment nor do they evince a willful or wanton disregard of the employer's interests nor are they carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At the most, the claimant's performance was mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity or ordinary negligence in isolated instances but this is not disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,480.00 since separating from the employer herein on or about February 1, 2005 and filing for such benefits effective February 6, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of March 7, 2005, reference 01, is affirmed. The claimant, Jolyne M. Walsh, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. The claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/pjs