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

LACEY D HIKE Claimant, and SCOTTISH RITE PARK INC Employer.	:	HEARING NUMBER: 09B-UI-08807 EMPLOYMENT APPEAL BOARD DECISION

N O T I C E

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

D E C I S I O N

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. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Lacey D. Hike, worked for Scottish Rite Park, Inc. from January 2, 2007 through May 7, 2009 as a full-time registered nurse. (Tr. 8-9, 10-11,) As a registered nurse, the claimant's duties were to " ... follow through with physician's order, both medication and treatment orders; to be able to perform assessments of residents who needed follow-up, either acutely or chronic conditions...communication with physicians... family members of the residents and documentation

of… medications given… " (Tr. 10, 11) Ms. Hike's immediate supervisor was Kim Gahan, the Director of Nursing. (Tr. 10)

The employer has a company policy that prohibits" … giving meds without an order [as it] is practicing without license and is not tolerated." (Tr. 9) The claimant received a couple of verbal warnings in 2008. (Tr. 13, 31) An LPN reported in March of 2009 that Ms. Hike gave an extra dose of Lasix to a resident, but the employer was unable to verify the accusation and took no disciplinary action. (Tr. 12, 18-19, 31) On April 16, 2009, the employer issued a first written warning to Ms. Hike for pre-setting her cart medications which is against the Nurse Practice Act as well as the state and federal standards. (Tr. 12, 16, 30, Exhibit C)

On May 6, 2009, the claimant expressed concern to another LPN (Melissa Eddy) that a resident was having difficulty with constipation and thought that the doctor should be called for an order for something. (Tr. 29) Ms. Hike noted that the morning pill had already been given, but the evening pill remained with the spare pill missing. (Tr. 29) Later, the employer learned from Michelle Diw (LPN) (Tr. 22, Exhibit B) that the claimant reported to the oncoming nurse (Melissa Eddy, another LPN) (Tr. 27, Exhibit A) that she (Hike) had given a resident an extra dose of stool softener that was not ordered because the claimant believed she needed it due to the resident's constipation. (Tr. 9, 11, 14-15, 21, Exhibit D) Melissa did not actually see Ms. Hike give the extra dosage, but relayed that the claimant told her she gave the resident "an extra Senna." (Tr. 26-27)

The following day, the claimant attended a mandatory meeting after which Ms. Gahan (DON) pulled her aside and questioned her about the incident. (Tr. 31) Ms. Hike denied telling anyone, much less administering an extra dose of medication to a resident. (Tr. 32) The claimant asked for proof of the allegation (written documentation) but the employer denied her request stating, "That is part of our investigation." (Tr. 32) The employer then terminated the claimant for violating protocol. (Tr. 32, Exhibit D)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
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> 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 discharged for an accumulation of alleged violations. The claimant acknowledged the verbal warnings received in 2008 and also admitted receipt of the first and only warning in 2009 for which she denied having knowledge that her action was a violation. (Tr. 30) These warnings, each unto themselves, do not constitute misconduct. Taken together, they may arguably establish a pattern of behavior that may be construed as "… carelessness or negligence of such degree of recurrence as to manifest equal culpability (misconduct)…" That first written warning, however, was not a final and current act.

871 IAC 24,32(1)"a." However, 871 IAC 24.32(8) provides:

> *Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The final act here involved the allegation that the claimant gave an extra stool softener to a resident without a doctor's order. The only witness to the alleged incident was Melissa, the oncoming LPN, who claimed Ms. Hike told her she gave an extra dose of 'Senna' to the resident. According to the claimant's unrefuted testimony, this resident didn't have an order for Senna; rather, the order was for 'Colace', which the claimant denied giving any extra dose. It would seem that if the claimant had reported what Melissa alleged, the claimant would have reported Colace, as opposed to Senna. This error in naming the medication diminishes Melissa's credibility. In addition, the employer's argument that there were two witnesses to the incident (Melissa and Michelle) is not probative that the claimant committed the act. Michelle's report to the employer is merely hearsay of information she received from Melissa that was inaccurate. Plus, Michelle was not available at the hearing to testify to the matter.

Ms. Hike, on the other hand, not only denied that she gave an extra dose to the constipated resident, but testified that the resident was to be administered two doses of Colace daily – a morning and evening

dose,

with a spare, if ordered. (Tr. 29) The claimant recalled that the morning dose had been given, which was corroborated by her supervisor (Tr. 29), and that the evening dose was still there, but the spare was missing. This circumstance could reasonably be construed as either the resident missed receiving the evening dose and was later given the spare; or the resident received the spare dose on time and in place of the actual evening dose. Either way, the resident received her two daily doses, as was documented by the claimant.

In taking the claimant's denial, Melissa's misidentification of the medication's name and the one remaining pill into consideration, we find the claimant's testimony more credible that she did not give, nor tell Melissa that she administered an extra stool softener to the resident. At worst, the claimant may have pulled the wrong pill when she administered the second dose to the resident. This mistake, however, does not rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated July 9, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

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Monique F. Kuester

AMG/ss