

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**KAY E SMITH**  
Claimant

**APPEAL NO. 07A-UI-08484-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**  
Employer

**OC: 08/05/07 R: 03**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Care Initiatives (employer) appealed a representative's August 28, 2007 decision (reference 01) that concluded Kay Smith (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 19, 2007. The claimant participated personally. She offered additional witnesses, Mary Garver and Sue Randall. The employer was represented by Jennifer Coe, Hearings Representative, and participated by Steve Dowd, Administrator. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 21, 2005, as a full-time licensed practical nurse working as a staff nurse. The employer told a certified nursing assistant (CNA) to cut toe nails of residents. The administrator told the CNA she could cut the nails of residents with ingrown toenails.

A speech therapist told the claimant to contact the doctor to change the resident's feeding orders. The claimant discovered the family was against the change in orders. She told her supervisor, the director of nursing, about the conflict and asked her to handle the situation. On March 21, 2007, the employer issued the claimant a final written warning for failure to contact the physician. The employer warned the claimant that further infractions could result in her termination from employment. Later the director of nursing apologized to the claimant for the warning. The claimant had acted properly.

On May 10, 2007, the claimant saw that a resident had an ingrown toenail and the claimant did not have the proper tools to handle cutting the nail. She contacted the CNA and the CNA cut the nail while the claimant assisted. Immediately after this another resident passed away. The

claimant was called to handle the situation. She asked the CNA to chart their actions regarding the toenail even though it was contrary to policy. The claimant made the choice to speak with the other resident's family rather than chart her actions.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

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). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide adequate evidence of misconduct at the hearing. The employer issued the claimant a warning and then apologized for doing so. The employer authorized a CNA to cut ingrown toenails and then fired the claimant for asking the CNA to do so. The single incident of failing to chart was not repetitive in nature sufficient to constitute misconduct. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's August 28, 2007 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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