

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANNE M COLVIN-DUDEK**  
Claimant

**APPEAL NO. 13A-UI-03100-N**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALEGENT HEALTH**  
Employer

**OC: 02/03/13**  
**Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated March 8, 2013, reference 01, which denied unemployment insurance benefits finding that she was discharged from work for failing to follow instructions in the performance of her job. After due notice was provided, a hearing was held in Council Bluffs, Iowa on April 25, 2013. Claimant participated. Participating on behalf of the claimant was Mr. Benjamin J. Wischnowski, Attorney at Law. The employer participated by Ms. Alyce Smolsky, Hearing Representative and witnesses Judy Ambrose, Supervisor Mammography Department and Ms. Jennifer Smith, Human Resource Representative. Exhibits One, Two, Three and Four were received into evidence. Exhibit Five was received. Exhibit Five-A was not received into evidence. Exhibit Six was received. An additional exhibit now identified as Exhibit Seven, a Diagnostic Center Quality Improvement Plan document, was offered but not received into evidence.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Anne Colvin-Dudek was employed by Alegent Health from April 28, 2003 until February 6, 2013 when she was discharged from employment. The claimant held the position of part-time mammography technician and was paid by the hour. Her immediate supervisor was Judy Ambrose.

Ms. Colvin-Dudek was discharged from her employment on February 6, 2013 when she mislabeled the left breast of a patient being given a mammography cad screening as the right breast, when the patient's left breast was the subject of the mammography cad screening. The mislabeling error on the February 4, 2013 mammography was noted by the radiologist. Although the error was noted, the misidentification could not be removed from the mammographic record as the identification becomes permanent once it is completed and sent by the mammographic technician.

Ms. Colvin-Dudek had been trained on the proper procedures to identify the correct patient and to correctly identify the portion of the patient's torso that was being examined and procedure requires that the identification be verified by the technician before being finalized and sent to the radiologist. The image in question had been initialed by Ms. Colvin-Dudek signifying that it had been reviewed and was correct. Ms. Colvin-Dudek had been warned about similar errors or omissions prior to her discharge. The claimant had received a final warning on December 14, 2012 for verifying and sending an image that identified the wrong patient and the claimant had been warned on May 8, 2009 about image quality and proper positioning of patients. When the subject of the February 4, 2013 mammogram that identified the wrong breast on the patient that previously had one breast removed, it appears that the claimant anticipated her discharge by asking, "Am I fired?"

Ms. Colvin-Dudek had repeatedly demonstrated her ability to adequately perform the duties incident to her job as a mammographic technician and at times samples of her work had been used to demonstrate the proficiency of the medical facility's mammographic department to state officials. Ms. Colvin-Dudek had previous training in her field prior to joining Alegent Health and had been certified as a mammographic technician. The claimant had also received additional training in 2008, provided by her employer.

Mammographic technicians who make clerical errors such as identification errors have the opportunity to correct errors in the mammographic reports that they are forwarding by reviewing the report before initialing as being correct and complete and forwarding it to the radiologist for medical interpretation. Ms. Colvin-Dudek had not indicated that she was unable to perform her work because of lack of staffing or overwork. The employer was unaware of any system errors in the equipment provided to the claimant for her work. Based upon the repetitive nature of the claimant's errors, the employer concluded that the claimant should be discharged from employment. The employer did not believe that the claimant's poor performance was due to lack of ability or training as the claimant had repeatedly demonstrated her competence on a regular basis.

It is the claimant's position that her poor performance was not intentional but due to workloads because of the equipment that she was assigned to use.

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

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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). Misconduct must be substantial in order to justify a denial of unemployment benefits. Conduct serious enough to warrant discharge may not necessarily be 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 or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In this case the evidence establishes that Ms. Colvin-Dudek was a trained mammography technician who is certified and had repeatedly demonstrated her ability to perform her duties in a correct and error-free manner. The claimant's work had been used at times to demonstrate the department's competency to state officials. The evidence establishes that although the claimant had the ability to work at the level of competency expected by her employer, the claimant did not always do so on a consistent basis. During the course of her employment Ms. Colvin-Dudek had received a number of warnings about identification errors of patients, the portion of the anatomy that was being identified, positioning of patients and the quality of the images completed. Ms. Colvin-Dudek was given the opportunity to enter a diagnostic improvement program that is available to technologists at the employer's facility, but chose not to fully avail herself of those opportunities.

The claimant was most recently placed on notice that her work was not satisfactory and her employment was in jeopardy on December 14, 2012 when she was issued a second final warning. A decision was made to terminate the claimant when she again made a substantial error in a mammography image identifying the left breast of a patient being examined as the right breast. Prior to sending the report to the radiologist the claimant was required to review it and initial that it was correct and did so. The radiologist immediately noted the error that the wrong breast had been identified. The patient in question only had one breast. Based upon the repetitive nature of the claimant's errors after being warned and because of the competency that she possessed, the employer reasonably concluded that the claimant's errors were due to negligence and not lack of ability. A decision was therefore made to discharge Ms. Colvin-Dudek from her employment.

The administrative law judge concludes based upon the evidence in the record that Ms. Colvin-Dudek did not intentionally make errors. The administrative law judge, however, does find that the claimant's negligence was of such a reoccurrence or degree so as to manifest equal culpability under the provisions of the law. The claimant had been warned and was aware of the employer's reasonable expectations. She understood the importance of proper identification and had the opportunity to review her work prior to initialing it and forwarding it. The claimant was aware that once forwarded the records became permanent and the identification errors remained with the records thereafter.

For the reasons stated herein the administrative law judge concludes that the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

**DECISION:**

The representative's decision dated March 8, 2013, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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