

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE L DAULT
Claimant

APPEAL NO. 07A-UI-02278-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 01/21/07 R: 02
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Care Initiatives, filed an appeal from a decision dated February 27, 2007, reference 02. The decision allowed benefits to the claimant, Nicole Dault. After due notice was issued a hearing was held by telephone conference call on April 9, 2007. The claimant participated on her own behalf and was represented by Iowa Legal Aid in the person of Sarah Stilwill. The employer participated by LPN Carol Sullivan, LPN Diane Climber, CNA Erica Chevalier, Director of Nursing (DON) Kelly Linderman and was represented by TALX in the person of Lynn Corbeil. Administrator Shanna Laughton observed the proceedings but did not offer testimony. Exhibits One and A were admitted into the record.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Nicole Dault was employed by Care Initiatives from October 3, 2006 until February 16, 2007, as a full-time CNA working 6:00 a.m. until 2:00 p.m. During the course of her employment the claimant received warnings regarding poor work performance because she failed to do the required three “rounds” per shift to check on the residents. Residents were found soaked in urine and with dried fecal matter on them, indicating they had been in that condition for some time. If the claimant had been doing her rounds as required these residents would have been found and cleaned up and changed.

On December 19, 2006, she was placed on a 30-day probation after receiving two more warnings for failing to do her rounds as required and not following proper procedures when she left dirty, urine-soaked sheets on the floor. She was also transferred to the day shift where she could be re-trained and supervised more closely.

On January 16, 2007, she was heard “yelling” at a resident on the Alzheimer’s unit. Another CNA entered the room to assist and found the resident, Leo, half naked on the side of the bed without the alarm having been set and he was unsecured, all of which were violations of resident care

provisions and residents' rights. She was later heard "yelling" at another resident, Howard, mostly complaining to him about Leo.

The incident was reported and DON Kelly Linderman investigated by getting statements from the CNA and the charge nurse who witnessed the event. In addition to yelling at the residents the claimant was accused of rough handling of Leo. Ms. Dault was questioned and she stated she had been frustrated that day and perhaps had raised her voice more than she should have but denied verbal abuse or being physically rough.

Ms. Dault had received training, and re-training, on how to handle residents and was reviewed on the residents' rights policy. At the time she was hired the administrator at the time, Jack, discussed her medical form with her as she had indicated she had had a shunt implanted for hydrocephalus, and she assured him she could do the job but was slow. He indicated that speed was not of the essence. Later, after her discharge, the claimant produced a statement from her physician to the Appeals Section, which indicated not only the claimant had had the shunt because of hydrocephalus, but was of "borderline intellect."

REASONING AND CONCLUSIONS OF LAW:

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).

The claimant did notify the employer she had a shunt for hydrocephalus and did assure the employer she could do the job but was “slow.” It appears the administrator who hired her believed this to be a reference to speed, but given the claimant’s assertions at the appeal hearings, it is possible she meant it the context of the “borderline intellect.” In any event, it is fairly obvious she took the administrator’s statement that speed was not of the essence to mean that she was being excused from performing all her regular duties such as three rounds during her shift.

The warnings she received should have disabused her of this but she asserts she “did not recall” various things or did not understand what she was being told when the warnings were given. She never asked for further explanation in the same way she did not ask for help getting her duties done. The administrative law judge notes Ms. Dault “did not recall” most events which were not favorable to her but had very good recall of any event that was favorable to her.

Nonetheless, the employer’s witnesses all acknowledged the claimant never did perform her job duties as required throughout the entire course of her employment. It is evident that the claimant was not correct when she assured the person who hired her that she could do the job, because she could not. In addition, she did not notify the employer she was incapable of doing all of her duties as required but instead remained silent and jeopardized the health and safety of the residents for whose care and wellbeing the employer was responsible.

The issue is therefore whether Ms. Dault was not only incapable of doing her job but of understanding that her lack of ability was a detriment to the employer and that her inability to do the job would frustrate her to the point where she would forcefully express her frustration to the residents. The administrative law judge must conclude the claimant’s “borderline intellect” rendered her incapable of understanding she misrepresented her abilities at the time of hire, the negative consequences of her inability to do her job and to understand the necessity to cease employment when she began to jeopardize the residents. Without willful and deliberate conduct contrary to the employer’s best interests there is no misconduct and disqualification may not be imposed.

DECISION:

The representative’s decision of February 27, 2007, reference 02, is affirmed. Nicole Dault is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs