

**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**

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**Appeal Number: 05A-UI-00139-H2
OC: 12-05-04 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/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 29, 2004, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held in Dubuque, Iowa, on March 22, 2005. The claimant did participate and was represented by Arthur Gilloon, Attorney at Law. The employer did participate through Marvin Ney, General Manager, and was represented by Sarah Stork Meyer, Attorney at Law. Claimant's Exhibit One and Two were entered and received into the record. Employer's Exhibits A through E were entered and received into the record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as an EMT full time beginning on September 4, 2003 through

December 10, 2004 when she was discharged. The claimant was allegedly discharged for insubordination in refusing to make a patient call to a hospital for a call she participated in on November 29, 2004. On November 29, 2004, the claimant and a coworker, Brenda, were dispatched on a call to a scene where the patient was suffering from an asthma attack. When they arrived at the scene, the patient was inside the house which was crowded with first responders from varying fire departments. The claimant's coworker Brenda began interviewing the patient and because it was so crowded in the house, the claimant went back out to the ambulance to get it ready to transport the patient to the hospital. The claimant turned on the heaters in the back of the ambulance and prepared for the transport. She returned to the house where she heard Brenda talking to the patient about a nebulizer treatment. The claimant then went to the ambulance and prepared the medicine for the nebulizer treatment and brought it back into the house for Brenda to administer to the patient. After Brenda started the nebulizer treatment, the patient was placed on the gurney and was placed in the ambulance for transport to the hospital. Normally either the claimant or her coworker has to drive the ambulance, leaving only one of them in the back with the patient. That person in the back with the patient would make the call to the hospital to report information on the patient. Occasionally, as in this instance, one of the first responders from the fire department offers to drive the ambulance to the hospital. Because another first responder drove the ambulance to the hospital both the claimant and Brenda were in the back of the ambulance and comforting the patient. No new medication was issued to the patient in the back of the ambulance. While on the way to the hospital, Brenda asked the claimant to call in the information to the hospital. The claimant reached for a pen and paper to get the information she would need from Brenda to make the call. The claimant did not have all the information she needed because she was out at the ambulance while the Brenda was gathering the information from the patient. They were quickly approaching the hospital and the claimant realized that by the time Brenda relayed all of the information to her and she relayed it to the hospital they would have arrived. The claimant then suggested to Brenda that since she knew all the information, that she make the hospital call. Brenda expressed no displeasure at making the call and did in fact make the call. By making the call Brenda was not prevented from performing any other duties. The patient did not suffer because the claimant was there to provide comfort and care while Brenda made the call. Both the claimant and Brenda had made numerous calls to the hospital before this event. The employer has no policy either formal or informal about which of the employees is to make the call. Brenda was finishing making the call to the hospital when the ambulance pulled up at the emergency room bay. There is no way that the claimant could have taken all the information from Brenda, and relayed the call to the hospital prior to arriving at the hospital if Brenda could not have accomplished the same when she had all of the information already. Brenda, although still an employee, did not testify at the hearing. The claimant had no credible previous history of discipline for insubordination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 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). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985).

The claimant did not make the call simply because she could not have gathered all of the information she needed from Brenda and relayed it to the hospital prior to arriving at the hospital. The claimant's credible testimony is uncontroverted by any eyewitness from the employer. There was no requirement that the claimant make the call and the employer has no policy that would have put the claimant on notice that it was her sole responsibility to make the call. In fact, had a first responder not driven the ambulance to the hospital, the claimant would have been driving the ambulance as Brenda was the paramedic providing patient care during this call. Under the circumstances the most reasonable thing to do was to have Brenda make the call herself. The administrative law judge is convinced that the claimant acted reasonably in

having Brenda make the call especially since Brenda, who had all of the information, was not able to complete the call prior to the ambulance arriving at the hospital.

The previous discipline for the claimant is suspect. The claimant alleges that the employer was trying to get rid of her and the administrative law judge is convinced that her argument has merit. On November 18, 2004, the employer posted a warning notice to all employees that they not use cell phones when making calls to hospitals but that they instead use the radio provided. The claimant signed off that she had read the note on November 18 and then a short time later that same day was handed a written warning, dated November 16, 2004, for using a cell phone to call the hospital instead of the radio. The employer has dated the warning notice November 16, did not give it to the claimant until November 18 (after the notice was posted) and the alleged event of misconduct was for November 4. The timing of the event indicates that the employer was trying to build a disciplinary history for the claimant in an effort to discharge her for misconduct. The uncontroverted testimony of the claimant was that other employees had previously used cell phones to call the hospital but none of them were disciplined. After signing the notice of November 18, the claimant never used a cell phone to place a hospital call.

The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. The claimant's action in asking Brenda to make the hospital call was reasonable under all the circumstances. The administrative law judge concludes that the claimant was not insubordinate and no misconduct has been established. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The December 29, 2004, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/tjc