Appeal Number: 06A-UI-02797-H2T
OC: 02-12-06 **R:** 03
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.

CINDY J NELL
PO BOX 425
NEW HAMPTON IA 50659-0425

MASTER CARE CENTERS INC
CARE CENTRE OF NEW HAMPTON
950 SPYGLASS CR
DAKOTA DUNES SD 57049

_____
(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 February 27, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 29, 2006. The claimant did not participate. The employer did participate through John Alvarez, Administrator and Sandy Albrecht, Housekeeping Supervisor and Office Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a housekeeping aid part time beginning December 1, 2005 through February 10, 2006 when she was discharged for poor work performance. The claimant was discharged for not cleaning properly. The claimant did not clean around the sink and toilet thoroughly enough by moving the products and cleaning underneath them. She did not clean

the floors carefully enough as there were still soap streaks left on them. The claimant failed to dust all items in the residents' rooms and failed to pick up papers and all debris off of the carpeted areas. She had not received any warnings that her job was in jeopardy and performed the work to the best of her ability.

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.

Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986). Inasmuch as she did attempt to perform the job to the best of her ability but was unable to ever meet the employer's expectations, no intentional misconduct has been established, as is the employer's burden of proof. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Accordingly, no disqualification pursuant to Iowa Code Section 96.5-2-a is imposed.

DECISION:

The February 27, 2006, 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/kkf