

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBERT R FORT**  
Claimant

**APPEAL NO. 09A-UI-04509-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HUMBOLDT COUNTY MEMORIAL  
HOSPITAL**  
Employer

**OC: 02/15/09**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Humboldt County Memorial Hospital (employer) appealed a representative's March 13, 2009 decision (reference 01) that concluded Robert Fort (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 scheduled for April 16, 2009. The claimant participated personally. The employer participated by Mary Moritz, Human Resources Director and Administrative Assistant, and Mike Sexe, Manager of Environmental Services.

**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 June 9, 2007, as a full-time environmental services janitor. The claimant was supposed to arrive at work at 5:30 each morning. The claimant was supposed to sweep and mop the floors. In addition he was supposed to clean the hood and vents over the stove in the dietary department.

The claimant worked without incident until the end of December 2007. The claimant had personal issues at home that affected his work. On January 10, 2008, the employer issued the claimant a warning regarding negative attitude and failure to follow instructions regarding his work. The claimant admitted he had issues at home. The employer offered Employee Assistance Services.

Unbeknownst to the claimant, the employer was unhappy with the claimant's cleaning of the dietary hood and vents. On February 2, 2009, the employer talked to the claimant about the vents. On February 5, 2009, the employer told the claimant not to start work before 5:30 a.m. The claimant could not sleep and arrived at the jobsite at 4:00 a.m. He did not work but had a cup of coffee.

On February 12, 2009, the employer met with the claimant to talk about the improper cleaning of the vents and hood. The condition of the floor was also addressed. The claimant decided to sweep and mop the floor later than noon. The employer showed the claimant how to clean the vents and hood. On February 13, 2009, the employer discovered the claimant continued to arrive at 4:00 a.m. On February 16, 2009, the employer terminated the claimant for poor performance.

### **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). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). 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 employer discharged the claimant for poor work performance and has the burden of proof to show evidence of intent. The employer did not provide any evidence of intent at the hearing. The claimant's poor work performance was a result of his lack of training and miscommunication. The claimant did not

stop arriving at 4:00 a.m. because he was not working at 4:00 a.m. The employer only warned the claimant about starting work at 4:00 a.m. The vents and hood were not cleaned properly because the claimant was not shown the proper way to clean the vents until the very end of his employment. He had no other chance to show he could clean them properly. When the claimant discovered the issue with the floor cleaning, he changed his schedule so that the floor would be cleaned later in the day. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's March 13, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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