BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

SUSAN K KNIGHT	:	
Claimant,	:	**HEARING NUMBER:** 07B-UI-09852
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
HCM INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5(2)a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Susan Knight (Claimant) was employed by HCM, Inc. (Employer) from January 12, 2004 until September 17, 2007 as a registered nurse. (Tran at p. 2). She was last employed part-time and worked approximately 24 hours each week during the night shift. (Tran at p. 2-3 p. 13-14; p. 21). She was discharged based on allegations that she was sleeping on the job, watching television when she should have been working, and stealing food from the facility. (Tran at p. 3; p. 21; Ex. 1). The Claimant had no prior warnings of any sort. (Tran at p. 3).

On September 17, a CNA reported that Claimant had slept during her shift and had also prepared food for herself from the facility kitchen on September 14. (Tran at p. 3; p. 14; Ex. 1). The employer spoke with other CNA's, who confirmed that Claimant did spend time during her shift sitting in the recliner in front of the television. (Tran at p. 3-4; p. 8; p. 14; Ex. 2-4). As a result of these reports, Claimant was discharged on September 17, 2007. (Tran at p. 3; Ex. 1).

Claimant had advised the director of nursing that she would be performing some of her paperwork while seated in the recliner because it was easier on her back. (Tran at p. 15). She had undergone back surgery in the past. (Tran at p. 24). She also sometimes sat in the recliner with an ice pack on her back if she was having pain. (Tran at p. 9; p. 15; p. 17; p. 19; p. 20; p. 22-23). Claimant was always available to perform the change-of-shift reports and to perform the narcotics count. (Tran at p. 7). She was the only staff member assigned to dispense medications during her shift and she passed them as scheduled. (Tran at p. 7; p. 12-13). She also performed all of the necessary assessments required by her position. (Tran at p. 7; p. 12-13). There were occasions on which treatments were missed by Claimant but the director of nursing did not feel the isolated instances warranted disciplinary action. (Tran at p. 13). On the whole, there were no complaints that Claimant was not performing her duties or that she was not available when staff needed her. (Tran at p. 6; p. 7; p. 21). The Board agrees with the finding of the Administrative Law Judge that the Employer failed to prove by a preponderance that the Claimant was sleeping on the job or being inattentive to her duties by watching television when she should have been working.

The employer's kitchen is locked at 7:00 p.m. when the kitchen staff leaves. (Tran at p. 25; p. 29). Only the nurses have a key to the kitchen. (Tran at p. 3; p. 30). In the past, the kitchen staff would, on occasion, leave leftovers for the night shift to eat. (Tran at p. 17-18; p. 21-22). Although these had initially been left out in the break room the practice was later changed to placing the leftovers in the refrigerator in order to avoid spoilage. (Tran at p. 17-18). The record contained no information on the Employer's policy regarding the handling of leftovers or the bringing of food to work by staff.

The Employer supplied no testimony that the food the Claimant was seen to be eating on September 14 was in fact the facility's food. It supplied only one witness who had seen the Claimant eating at all on September 14. (Tran at p. 8). The other witness described eating, but not on that day. (Tran at p. 16; p. 17; p. 18; p. 19; p. 20). They did not testify that the food was the facilities' food rather than leftovers or the Claimant's own. (E.g. Tran at p. 20). Similarly the only witness to eating on September 14 testified that she was unable to say that the food was the facility's. (Tran at p. 8; p. 29). The Employer has failed to prove by a preponderance that the Claimant, on any of the referenced incidents of eating food, was engaged in the prohibited act of eating the facility's food rather than the allowed practice of eating leftovers left by the kitchen staff or food brought to work by the Claimant herself.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) provides:

> *Discharge for Misconduct.* If the department finds the individual has been

discharged for misconduct in connection with the individual's employment:

> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The Employer asserted the Claimant was discharged for watching T.V., for sleeping on the job, and for eating food meant for residents. We have agreed with the Administrative Law Judge that the first two were not proved by the greater weight of the evidence. We also have held that the final incident of eating food meant for residents has not been proved. This final incident was manifestly not the Employer's primary concern, at least judging by the record the Employer developed. There is no specific testimony on anyone being warned about eating facility food, or on specific policies concerning leftovers. Still, if the Claimant were consuming the Employer's property we would understand the Employer's concern and could find misconduct. But we just can't tell from this record what was happening. Testimony that the Claimant was eating unspecified foodstuffs and was seen to be exiting the kitchen with them does not establish that the Claimant took food from the refrigerator that she was not allowed to take. It is common for people to prepare meals, whatever the ultimate source of the

ingredients, in a kitchen – it's what kitchens are for. If we knew more about the break room we might be able to tell how credible it is that the Claimant used the kitchen rather than the break room facilities, but all we know is that there was a break room and it had a refrigerator. Based on the record it is at least as likely that the Claimant was eating food she had brought or leftovers that had been left by the cooks than she was eating the facility's food. The Claimant's inability to recall whether she ate food on a specific day does not, to our mind, indicate mendacity. It may indicate

kitchen and couldn't recall whether or not she did that particular night. It may indicate that the Claimant, like the Employer, was more concerned about the serious allegation of neglecting patient care by sleeping rather than the allegations of pilfering food. In any event, the evidence on the food issue is, at best, in equipoise and we thus find against the Employer as the party with the burden of proof.

DECISION:

The administrative law judge's decision dated November 8, 2007 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of $500.00 is vacated and set aside.

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Elizabeth L. Seiser

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John A. Peno

DISSENTING OPINION OF MARY ANN SPICER :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Mary Ann Spicer

RRA/kjo