

**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**

**PAULA J AASLAND
41740 – 225TH ST
LAKE MILLS IA 50450**

**LUTHERAN RETIREMENT HOME INC
700 TENTH ST N
NORTHWOOD IA 50459**

**Appeal Number: 05A-UI-05327-DT
OC: 04/24/05 R: 02
Claimant: Respondent (5)**

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

STATEMENT OF THE CASE:

Lutheran Retirement Home, Inc. (employer) appealed a representative's May 13, 2005 decision (reference 02) that concluded Paula J. Aasland (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 8, 2005. The claimant participated in the hearing. Patrick Ogden appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Four and Claimant's Exhibit A were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After a prior period of employment at the employer through a temporary employment firm, the claimant started working directly for the employer on March 19, 2004. She worked full time as a night nurse in the employer's long-term care nursing facility. Her last day of work was April 24, 2005. The employer discharged her on April 26, 2005. The reason asserted for the discharge was an incident that occurred on the night of April 22 into April 23, 2005 after prior unrelated warnings.

The claimant has fibromyalgia. In the past, she had been prescribed effexor, a drug that is an antidepressant but has also been used for pain relief for fibromyalgia. She had not taken the drug for about a year, but due to increased pain, had consulted with her doctor who advised that she resume taking effexor. Normally there is a one-week break-in period for the medication, but because the claimant had tolerated the medication well when she had taken it previously, the doctor advised that she could go from a half-dose to a full dose on the second day. She took the medication shortly before reporting for work at 10:00 p.m. April 22, 2005. After arriving at work, she began to feel somewhat ill and chilled, but believed she would shake it off; she did not immediately realize that it was a reaction to the medication.

As the evening went on, however, her condition worsened, and she was very dizzy, and somewhat disoriented. She laid on the floor for a while, on a bench for a while, and on empty beds for a while. She was not sufficiently rational or stable in order to administer medication to residents or to even attempt to contact the director of nursing or another nurse to come in to relieve her. The negative effects of the medication did not wear off as it was an extended release form of the drug. The certified nursing aides on duty ultimately contacted the director of nursing at approximately 3:20 a.m., who then came in. However, she did not send the claimant home; rather, she directed the claimant to continue to perform her duties, although the claimant was still unable to perform the duties. When the relief duty nurse arrived at approximately 5:30 a.m., the claimant went home.

The claimant had received verbal warnings for unrelated performance issues on June 3, 2004 and August 31, 2004, and on March 9, 2005 had received a written warning for storing a cart in a biohazard room and for borrowing a resident's bag to use as a pattern without permission. She was not advised that the variety of unrelated incidents and issues was placing her job in jeopardy should there be any other type of performance issue.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa

Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or

2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is primarily her conduct on the shift beginning 10:00 p.m. on April 22, 2005. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally ignored the employer's interests in taking her pain medication as directed by her doctor and then reporting for work, or in failing to recognize the severity of her negative reaction and obtain other coverage for the shift. In fact, the evidence indicates that the claimant was incapable of having the requisite intent. Therefore, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's May 13, 2005 decision (reference 02) is modified with no effect on the parties. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/pjs