

**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**

**ROBERT J DUNHAM
2317 VIRGINIA ST
SIOUX CITY IA 51104**

**BOYS & GIRLS RESIDENTIAL
TREATMENT CENTER INC
PO BOX 1197
SIOUX CITY IA 51102-1197**

**JAY SMITH
ATTORNEY AT LAW
505 – 5TH ST STE 530
PO BOX 1194
SIOUX CITY IA 51102**

**Appeal Number: 05A-UI-11118-JTT
OC: 10/02/05 R: 01
Claimant: Appellant (2)**

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 for Misconduct

STATEMENT OF THE CASE:

Claimant Robert Dunham filed a timely appeal from the October 21, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 18, 2005. Mr. Dunham participated personally and was represented by Attorney Jay Smith. Human Resources Specialist Marie Thomas represented the employer. Exhibits One through Six and A through D were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Robert Dunham was employed by the Boys and Girls Residential Treatment Center as a full-time maintenance employee from October 29, 2001 until October 4, 2005, when Supervisor

Greg Pranke and Human Resources Specialists Marie Thomas and Mark Nielson discharged him for poor work performance.

Mr. Dunham received his work assignments from supervisor Greg Pranke. Mr. Dunham was expected to prioritize the various work assignments according to whether they needed to be completed within 24 hours, 48 hours, 72 hours and so forth.

The final incident that prompted the discharge came to the attention of supervisor Greg Pranke on October 4, when Mr. Pranke discovered that Mr. Dunham had failed to clean and disinfect storage room shelves and floor. On September 28, 2005, Mr. Pranke instructed Mr. Dunham to investigate a leak on the fourth floor of the facility. The leak was in a storage room. The leak appeared to have been in existence a significant period before it was reported to the maintenance staff. Mr. Dunham removed six wet ceiling tiles in the storage room and vacuumed up the water. Mr. Dunham investigated the source of the leak with Mr. Pranke and the next morning concluded it originated from the shower room above and resulted from residents failing to fully close the shower curtain. Mr. Dunham sealed the shower room floor and this appeared to resolve the leak. Though Mr. Pranke instructed Mr. Dunham to clean and disinfect the storage room shelves and floor, Mr. Dunham moved on to other work assignments that he thought were more important.

On October 3, Mr. Dunham was instructed to investigate a leaking pipe. Mr. Dunham subsequently contacted a supervisor and advised that he could not tell whether the water was a leak or condensation. The supervisor arrived to look at the pipe and discovered that Mr. Dunham was using a ladder that was too short to allow full inspection of the area. The supervisor instructed Mr. Dunham to fetch a taller ladder and then located the leak. The supervisor provided Mr. Dunham with instructions on fixing the leak. These instructions included the directive to tightly wrap the pipe with adhesive-backed insulation. Mr. Pranke subsequently observed the leak had reappeared and that Mr. Dunham had failed to properly wrap the pipe.

Mr. Dunham had additional prior reprimands. On July 21, 2005, the employer reprimanded Mr. Dunham for alleged carelessness and/or negligence in fixing broken exit signs on July 21. A juvenile resident had intentionally broken four fire exit signs. Mr. Dunham was on call after the normal work hours and responded to repair the signs. Mr. Dunham cleaned up the debris and broken parts, but left the wiring for the signs exposed until replacement signs were obtained. The employer reprimanded Mr. Dunham for leaving the wiring exposed. On November 18, 2004, the employer reprimanded Mr. Dunham for allegedly failing to perform daily boiler checks. On November 4, 2004, the employer reprimanded Mr. Dunham for allegedly sleeping in the break room during a 15-minute break.

The employer did not present testimony from supervisor Greg Pranke or any other supervisor involved in the issuing reprimands to Mr. Dunham.

REASONING AND CONCLUSIONS OF LAW:

The employer asserts that Mr. Dunham was discharged for ongoing poor work performance. Mr. Dunham asserts that the employer was insensitive to and failed to accommodate his diabetes and associated health issues. Mr. Dunham further asserts that he performed his duties to the best of his ability and appropriately prioritized his work assignments.

The question is whether the evidence in the record establishes that Mr. Dunham was discharged for misconduct in connection with the employment. It does not.

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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly

be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer had the ability and the obligation to present evidence to prove carelessness and/or negligence on the part of Mr. Dunham with regard to the final incident that prompted the discharge and with regard to the prior reprimands. The employer failed to present testimony from a single firsthand witness to corroborate its allegations of negligence and/or carelessness. The employer failed to present any evidence to rebut Mr. Dunham's assertion that he worked to the level of his ability and appropriately prioritized his duties.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Dunham was discharged for no disqualifying reason. Accordingly, Mr. Dunham is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Dunham.

DECISION:

The Agency representative's decision October 21, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kjw