

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

JUDITH F KUMM
Claimant

APPEAL NO. 18A-UI-00048-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SPURGEON MANOR INC
Employer

**OC: 12/03/17
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's unemployment insurance decision dated December 22, 2017, reference 01, which denied unemployment insurance benefits, finding that the claimant was discharged from work on November 14, 2017, for violation of a known company rule. After due notice was provided, a telephone hearing was held on January 25, 2018. Claimant participated. The employer participated by Ms. Brenda Waters, Director of Nursing; Ms. Merle Ann Steenson, Business Office Manager; and Ms. Maureen Cahill, Administrator.

ISSUE:

The issue is whether the claimant was discharged for job misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Judith Kumm was employed by Spurgeon Manor, Inc. from January 18, 2016 until November 14, 2017, when she was discharged from employment. Ms. Kumm was employed as a full-time Certified Nursing Assistant and was paid by the hour. Her immediate supervisor was Brenda Waters, Director of Nursing.

Ms. Kumm was discharged after the employer concluded that Ms. Kumm had participated in cell phone video recordings that had subsequently been posted on social media by another worker. The social media depictions were brought to the attention of the employer by another employee who had observed them on social media and recognized that the depictions were a violation of the home's code of conduct, cell phone, and social media policies. Spurgeon Manor, Inc. investigated the allegation and the video depictions were viewed by Ms. Cahill, Administrator, and Ms. Waters, Director of Nursing.

The depictions show two separate video filmings that had taken place at the employer's facility on November 11, 2017. Ms. Kumm was depicted in both of the recordings. In the first, Ms. Kumm could be seen in a resident's room dancing about in a "twiging" manner (the employer

defines “twiging” as dancing while shaking one’s hindquarters in a suggestive way). The depiction showed the claimant looking at the resident, it showed a portion of the resident’s arm and leg, and showed the claimant looking directly at the location in the room that had been the source of the recording. Also in the room, but not in the video depiction, was a second CNA who was filming Ms. Kumm and a third CNA who could not be identified by the employer and was not identified by Ms. Kumm or the other CNA who was filming Ms. Kumm’s actions. The second portion of the social media posting showed Ms. Kumm in a different portion of Spurgeon Manor’s facility on the same day. In the depiction, Ms. Kumm was wearing incontinence pads of the type used by residents. The claimant was wearing incontinence pads outside her clothing and posing for the cell phone recording.

After viewing the depictions, the employer concluded that Ms. Kumm had been a willful participant in the filmings. Established company policy prohibits employees from the use or the possession of cell phones at the facility during working hours. The company’s social media policy prohibits employees from posting, depicting, or displaying any photographs or any video recordings of residents, portions of resident’s bodies, or the facility in any demeaning way. The policy strictly prohibits keeping, distributing, or placing the depictions on social media networks. Employees are informed that violations of the rule constitute a violation of the company’s code of conduct and resident’s rights, and also constitute a violation of HIPAA. Employees also have a mandatory duty to report any violations.

After investigating the matter, the employer concluded the cell phone used to record the depictions had been in the possession of one of the other CNA’s in the room and that the social media posting had also been done by that CNA and not the claimant. The employer reasonably concluded, however, that claimant was a willing participant during the depictions and had violated the employer’s rules by her participation and by her failure to report violations as well. Because of the gravity of the situation, the resident’s family was informed and the matter was also reported to the Department of Inspections and Appeals for investigation.

It is Ms. Kumm’s position that she had only engaged in the dancing and related activities for the “benefit” of the resident to improve the resident’s mood, and that she was unaware that any activities were being recorded by the other worker and was unaware that the depictions had been posted on social media. Ms. Kumm asserts that although she was in the room with two other CNA’s for approximately 15 minutes and the other workers were idle during that time, she did not observe a cell phone used to record her activities that day.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes job-related misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual’s wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

In the case at hand, the claimant was discharged when the employer reasonably concluded that Ms. Kumm was a willing participant in the cell phone filming at the employer's facility that depicted the claimant in a resident's room behaving in a way that was contrary to the employer's interests and standards of behavior. Although Ms. Kumm denies any knowledge of the filming or participation in it, the second part of the depictions shows Ms. Kumm on the same day in the employer's facility, but in a different location wearing resident type incontinence pads outside her clothing in what reasonably appeared to mock the way residents by use the pads for medical reasons.

Ms. Kumm was aware of the home's policies which prohibited cell phone use and the depictions of this nature on social media. Claimant was also aware of the employer's code of conduct and the emphasis the employer placed on treating residents in a kind and respectful way.

The administrative law judge is mindful that Ms. Kumm maintains she was not the person who was taking the pictures and that she was unaware that the pictures were being taken. The administrative law judge finds the claimant's testimony strains credibility. The second depiction taken the same day shows the claimant intentionally wearing the incontinence pads outside her clothing in a mocking way for the specific purpose of being photographed and recorded by the

second CNA worker. The administrative law judge concludes that the claimant was a knowing and willing participant in the filming and therefore, knowingly and willingly violated the employer's policies.

The employer has sustained its burden of proof in establishing the claimant was discharged for disqualifying misconduct. Accordingly, the claimant is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

DECISION:

The representative's decision dated December 22, 2017, reference 01, is affirmed. Claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs