

**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**

**CYNTHIA M RODGERS-HELDT
2816 ROLLINS AV
DES MOINES IA 50312**

**NEWBURY MANAGEMENT CO
100 COURT AVE STE 212
DES MOINES IA 50309**

**Appeal Number: 04A-UI-03116-H2
OC 02-15-4 R 02
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 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 11, 2004, reference 01, decision that denied benefits. After due notice was issued, an in person hearing was held on May 11, 2004 at Des Moines, Iowa. The claimant did participate. The employer did participate through Juan Wheeler, District Manager and Bert Kersbergen, District Maintenance Supervisor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a resident manager full time beginning July 28, 2003 through January 23, 2004 when she was effectively forced to resign. Bert Kersbergen delivered a letter of January 22, 2004 from Juan Wheeler to the claimant's husband on January 23, 2004. The letter outlines the issues

that Ms. Wheeler had with the claimant's job performance. It was clear to both the claimant and her husband that Mr. Kersbergen was the eyes and ears for Ms. Wheeler. Ms. Wheeler relied on the information provided by Mr. Kersbergen in making decisions regarding employees. Mr. Kersbergen admitted at hearing that when he gave the letter to the claimant's husband he made it clear that their employment would not last much longer as Ms. Wheeler was not happy with their job performance. Mr. Kersbergen's testimony was unambiguous, he believed that at the end of his conversation with Mr. Heldt, Mr. Heldt would have believed that and his wife's (the claimant's) employment was going to end soon as Ms. Wheeler planned to discharge them. Ms. Wheeler enlisted the aid of Mr. Kersbergen in sending over with the letter. When Mr. Kersbergen delivered the letter he was acting as an agent for Ms. Wheeler and neither the claimant nor her husband would have any reason to doubt what he said. When the claimant read the letter she called Ms. Wheeler who told her that she thought it was best if the claimant and her husband resigned. The employer forced the claimant's resignation, it was not voluntary. Because the claimant believed that she was going to be discharged, she submitted a letter of resignation.

It is clear that the claimant and her husband, who acted as joint resident managers did not have a good working relationship with either the assistant managers or with Ms. Wheeler herself. The claimant made numerous attempts to sort out problems and issues with Ms. Wheeler and with the assistant managers. The claimant performed her job to the best of her ability. No evidence establishes that the claimant was intentionally attempting to fail at the job or to cause dissention on the premises.

The employer alleges that the claimant was not performing her job up to expectations based upon complaints she was receiving from some of the tenants as well as from the assistant managers. The employer has not established any misconduct on the part of the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). 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 testimony of Mr. Kersbergen makes clear that the claimant and her husband could reasonably believe that they were going to be discharged. Particularly when the claimant called Ms. Wheeler and Ms. Wheeler told her it was for the best if she resigned. Thus, the administrative law judge concludes that the claimant did not voluntarily resign, but was discharged. The employer alleges the claimant was rude. That allegation has not been established. The employer has failed to establish the claimant committed any intentional misconduct that would warrant a denial of her unemployment insurance benefits.

DECISION:

The March 11, 2004, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjf