

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

DELOROS D MEINDERS
PO BOX 21132
DES MOINES IA 50321

FIVE STAR QUALITY CARE INC
C/o THOMAS & THORNGREN INC
PO BOX 280100
NASHVILLE TN 37228

Appeal Number: 06O-UI-06882-S2T
OC: 08/07/05 R: 02
Claimant: Respondent (1)

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:

Five Star Quality Care (employer) appealed a representative's April 24, 2006 decision (reference 03) that concluded Deloros Meinders (claimant) was discharged and there was no evidence of willful or deliberate misconduct. A hearing was held on July 18, 2006, following due notice pursuant to Remand Order of the Employment Appeal Board dated June 29, 2006. Hearing notices were mailed to the parties' last-known addresses of record. The claimant participated personally. The employer participated by Patrick Quigley, Administrator, and Nancy Caulfield, Director of Nursing. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 9, 2005, as a full-time registered nurse. The claimant signed for receipt of the company handbook on September 6, 2005. Section 42 of the handbook states "Employees may not physically, verbally, emotionally, or psychologically abuse a resident, or visitor, or another employee or neglect patient care duties related to the safety, health, and/or physical comfort of the resident."

The employer issued the claimant a verbal warning for tardiness on February 21, 2006. On December 21, 2005, the employer held an educational session with the claimant. One of the topics was about verbalizing frustration around residents and visitors.

On March 10, 2006, at approximately 10:30 p.m. the claimant was near the nurse's station when her dental bridge fell out of her mouth. The bridgework was not supposed to be removable but the claimant had experienced problems with the porcelain and used denture adhesive to keep it firmly affixed. The claimant was extremely embarrassed and crawled around on her hands and knees trying to find the pieces to one of the teeth that shattered. The floor was covered with dirt balls, sand and food. The claimant found a recapped insulin syringe which had not been properly discarded. The claimant muttered "damn" under her breath and was making comments about the cleanliness of the floor. Some co-workers heard the claimant but understood her embarrassment and frustration. The claimant asked a co-worker to attend to a resident for her and the co-worker did so. Another resident saw the incident and another co-worker took the resident to her room.

The claimant was taken off the schedule for March 11, 12 and 13, 2006, while the employer investigated. The employer terminated the claimant on March 15, 2006, for violation of Section 42 of the company handbook.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible because she was available to testify at the hearing to the events which occurred. The employer's evidence was provided through statements of people who could not be cross examined.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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).

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 administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. Foul language of itself can constitute disqualifying job misconduct. Warrell v. Iowa Department of Job Service, 356 N.W.2d 587 (Iowa App. 1984). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide any evidence of repeated failure to follow instructions or repeated use of foul language at the hearing. In addition, the employer did not provide specific testimony on how the claimant had violated Section 42 of the handbook. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). While the claimant's one incident of saying "damn" may be serious enough to warrant her termination, it is not serious enough to deny unemployment insurance benefits. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's April 24, 2006 decision (reference 03) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/pjs