

**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**

**KATHRYN J MATLAGE
424 N 10TH ST
WINTERSET IA 50273**

**FIVE STAR QUALITY CARE INC
c/o TBT ENTERPRISES
PO BOX 848
GAITHERSBURG MD 20884**

**Appeal Number: 04A-UI-04453-DT
OC: 03/21/04 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

STATEMENT OF THE CASE:

Five Star Quality Care, Inc. (employer) appealed a representative's April 9, 2004 decision (reference 01) that concluded Kathryn J. Matlage (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 May 27, 2004. The claimant participated in the hearing. Delores Applegate appeared on the employer's behalf and presented testimony from one other witness, Robert Richardson. 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:

The claimant started working for the employer on September 1, 1987. She worked full time as a charge nurse in the employer's long-term care nursing facility. Her last day of work was March 8, 2004. The employer discharged her on March 18, 2004. The reason asserted for the discharge was not properly assessing a resident on March 1 and having two prior write-ups in a 12-month period.

The claimant had been given verbal warnings for missing a resident's medication administration on two occasions, January 8, 2003 and August 12, 2003. She was given a written warning for not properly assessing a resident's condition on March 21, 2003. No further details were available regarding the circumstances of that assessment issue. On February 15, 2004 she was given a second and final written warning because she had determined a treatment plan should be modified but had not notified or obtained approval from the treating doctor.

A new resident with a diabetic condition as well as other health issues moved into the facility on or about February 15. The claimant was off work at least several days between February 15 and February 29 for medical reasons. The claimant worked a 6:00 a.m. to 6:00 p.m. shift on March 1. She had only dealt with this particular resident on perhaps one other occasion. One of the first tasks she did when coming on duty was to check the claimant's blood sugar. She recorded a reading of 81. Normally a resident's doctor would be called if blood sugar fell below 80. This particular resident's blood sugar was normally nearly twice this amount, and had a history of continuing to fall if it got as low as 81. However, the claimant was not familiar with the resident's history and did not have access to it, as all the records had been pulled for review at the end of the month the night before and had not yet been returned. The resident did not eat well that day, and another blood sugar test was taken that afternoon. The result was 34, and the resident's treating doctor was called. After on-site treatment efforts to raise the blood sugar level directed by the doctor failed, the resident was taken to the hospital, where he died on March 7. It was unknown what role the March 1 drop in the claimant's blood sugar played in the resident's death.

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 Section 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 her failure to properly assess the resident's situation on March 1, 2004, after two other written warnings in the

last 12 months. Under the circumstances of this case, the claimant's failure to detect the eminent drop in the resident's blood sugar was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly assess the resident's condition.

DECISION:

The representative's April 9, 2004 decision (reference 01) is affirmed. 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/b