

**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**

**JULIE A ALFORD  
1122 – 1<sup>ST</sup> AVE NW  
WAVERLY IA 50677**

**LUTHERAN SERVICES IN IOWA INC  
ATTN – HUMAN RESOURCES  
3116 UNIVERSITY AVE  
DES MOINES IA 50311**

**Appeal Number: 05A-UI-02112-DT  
OC: 01/16/05 R: 03  
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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Julie A. Alford (claimant) appealed a representative's February 24, 2005 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Lutheran Services in Iowa, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 15, 2005. This appeal was consolidated for hearing with one related appeal, 05A-UI-02113-DT. The claimant participated in the hearing. Martha Swanson appeared on the employer's behalf. 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 April 23, 2004. She initially worked full time as a skilled development counselor; on or about December 1, 2004 she was promoted to the position of youth specialist in the employer's Waverly, Iowa residential campus providing social services and care to young adults. Her last day of work was January 18, 2005. The employer discharged her on that date. The reason asserted for the discharge was unsatisfactory job performance.

As a skilled development counselor, the claimant had received a verbal counseling in August 2004 for using poor judgment in driving her husband's truck to work when there were empty beer cans left in the truck bed. She received two counselings in September 2004, one for being too loud hollering at a youth when she was on the phone with a parent, as well as not having her necessary chauffeur's license, and another that was given to all of the staff regarding making and documenting phone calls to parents.

On January 18, 2005, while the claimant was carrying out her duties in the employer's classroom, a youth prone to escalation behavior approached a teacher, and in response to a statement by the teacher, began swearing. The claimant, who had worked with the youth before, gave the student a superficial flick of her finger on the back of his head to get his attention. He gave her a flick back, and then the two of them engaged in a few moments of non-contact horseplay, circling each other like boxers. The claimant did this with the successful intent of distracting the youth from escalating his anger toward the teacher; after a few moments, the situation was diffused and the youth went on to talk appropriately with the teacher. The claimant had been taught that where a youth is starting to escalate, any reasonable measure should be taken to interrupt that process; the staff was not prohibited from any physical contact with the youth.

About three hours after the incident, the claimant was called into the office of the facility's program managers. She was told her conduct had been inappropriate and had crossed borders, and that there had been a prior complaint that the claimant had been arguing with a teacher. The claimant denied arguing with a teacher. She attempted to explain the situation with the youth, but the employer determined to discharge her.

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 §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 the claimant's job performance, with the final incident being the situation with the youth on January 18, 2005. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. The claimant had not been previously warned with regard to any conduct such as that which occurred on January 18, 2005. There is no evidence the claimant intentionally failed to meet the employer's performance expectations. Under the circumstances of this case, the claimant's course of action on January 18, 2005 was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 24, 2005 decision (reference 02) is reversed. 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/pjs