

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

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Appeal Number: 04A-UI-02973-E
OC: 02-15-04 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, 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/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 12, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Waterloo, Iowa, before Administrative Law Judge Julie Elder on June 21, 2004. The claimant participated in the hearing with Attorney Cynthia Rybolt. Virginia Holbach, Secretary/Receptionist; Amber Jedlicka, Managing Director; Jan Madson, Nurse Coordinator; and Velda Phillips, Administrator, participated in the hearing on behalf of the employer with Attorney Lynn Smith. Employer's Exhibits One through Nineteen were admitted into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time resident assistant for Friendship Village from April 21, 1997 to February 16, 2004. The claimant was paged by Secretary/Receptionist Virginia Holbach February 16, 2004, and asked to bring the medication box. The claimant was having difficulty hearing Ms. Holbach on the walkie-talkies used by employees to respond to pages and became frustrated. She went to the medication room to get another walkie-talkie and that one did not work either. She then went to Ms. Holbach's desk and told her she had replaced the walkie-talkie but still did not have one that worked. Managing Director Amber Jedlicka heard the claimant talking loudly from down the hall and told her she was too loud. The claimant indicated she was upset about the walkie-talkie and Ms. Jedlicka told her to lower her voice. The claimant apologized and lowered her voice and Ms. Jedlicka asked Ms. Holbach to get the claimant another walkie-talkie. That radio was "screeching" when the claimant turned it on and she became upset again and Ms. Jedlicka took her to the office to discuss the incident. The claimant was agitated and Ms. Jedlicka told her to lower her voice and not to "yell" at her and then notified the claimant that she was being suspended for three days. The claimant received several medication error reports during her employment (Employer's Exhibit Two). The last error documented by the employer occurred January 2, 2004 (Employer's Exhibit Two). The claimant was suspended September 24, 2002, for repeated medication errors, disrespectful treatment of a resident, and displays of temper in front of a resident and toward a supervisor (Employer's Exhibit Fifteen). Administrator Velda Phillips issued the suspension memo and wrote, "I am hopeful that you will use this time to rethink your decision to work with frail and demented elderly. If you choose to continue in this career I would suggest two things: anger management counseling; rededication to following work procedure accurately" (Employer's Exhibit Fifteen). In December 2003, the claimant sought medical treatment for her anger and/or emotions and began taking Paxil at that time. On January 8, 2004, Ms. Jedlicka met with the claimant to discuss her performance and her interactions with residents and supervisors (Employer's Exhibit Ten). Ms. Jedlicka's memo cited problems with medication errors and communication with her supervisor, and stated, "You are easily distracted or overwhelmed by the daily tasks of this environment, causing you to get off track" (Employer's Exhibit Ten). After reviewing the claimant's file February 16, 2004, and determining her performance and communication had not improved, Ms. Jedlicka called the claimant and informed her the employer was terminating her employment. In a memo to Ms. Phillips February 16, 2004, Ms. Jedlicka explained the incident that occurred on that date and concluded by stating, "I feel that her heart is in the right place, but she just does not have the type of personality that is required in an environment like ours" (Employer's Exhibit Nine). The claimant filed a grievance form and met with Ms. Phillips February 20, 2004 (Employer's Exhibit Five). Ms. Phillips wrote a memo detailing their conversation and stated she suggested the claimant "look for a job that better suits her personality and abilities" (Employer's Exhibit Four).

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).

The employer has the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer had legitimate concerns about the claimant's medication errors and demeanor. The claimant's speaking voice is unusually deep and loud and it was evident during the hearing that she can sometimes sound strident or angry in recounting even routine events that she was not upset about. At least four memos written by the employer indicated the employer's belief that although the claimant's "heart is in the right place" her personality might not be suited to work with the "frail and demented elderly" clients served by the employer. The claimant did eventually seek treatment and began taking an anti-depressant/anti-anxiety medication in December 2003 in an effort to address various concerns. Poor work performance is not misconduct in the absence of evidence of intent. Miller v. EAB, 423 N.W.2d 211 (Iowa App. 1988). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979). The issue is not whether the employer was right or even had any other choice but 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). Although the employer's assessment of the claimant's suitability for the job was probably accurate, after observing the claimant's voice and demeanor during the hearing and reviewing the totality of the evidence, the administrative law judge cannot conclude the claimant's failure to meet the employer's expectations constitutes intentional misconduct as defined by Iowa law. Consequently, benefits are allowed.

DECISION:

The March 12, 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.

je/smc