

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**SANDRA BURKHART**  
Claimant

**APPEAL NO: 16A-UI-09847-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HEARTLAND EMPLOYMENT SERVICES**  
Employer

**OC: 07/31/16**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 30, 2016, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 27, 2016. The claimant participated in the hearing. Adam Aswegan, Human Resources Director, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**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 RN nurse supervisor for Heartland Employment Services from September 5, 2012 to July 14, 2016. She was discharged after kissing a terminally ill male resident on the forehead on two to three occasions since he entered the facility.

On July 12, 2016, the resident told the employer the claimant had been kissing him on the lips. He said it happened three to four times, the last being July 11, 2016, and made him uncomfortable. The claimant agreed she kissed him but stated it was on the forehead like she would kiss her children. The resident was dying and she found him “very kind and amazing” and she felt “bad she couldn’t do anything more for him.” She also said he never complained. The claimant indicated that when she gave him his eye drops she had kissed him on the forehead one to two times several months earlier and would tease him by saying when he recovered and she grew up they would have to get married because she liked to hear him laugh. She made the comment about her growing up because she sometimes felt sorry for herself but would then see the resident with Stage four cancer and realize how lucky she had it. The claimant believes the resident complained about her in July 2016 after she kissed him on the forehead July 11, 2016, because she had to rush him through his medication. He asked her to just leave it in his room but she was not allowed to do so under state law and the employer’s policy and he got angry when she refused his request.

The employer stated the claimant had been a nurse for several years and understood patient rights and dependent adult abuse. The claimant most recently signed the handbook January 12, 2015, containing the employer's sexual harassment policy. Additionally, she took a mandatory class the employer offered on sexual harassment which is unwanted physical contact or unwanted sexual advances.

The employer determined the claimant's actions were a type A violation which is a major or critical violation that results in termination. Rule 22 states employees may not sexually harass any individual by making uninvited or unwanted sexual advances, request sexual favors, or engage in other physical or verbal contact of a sexual nature.

The employer did not see any difference between the claimant kissing the resident on the mouth or the forehead and terminated her employment July 14, 2016, for making unwelcome sexual advances toward the resident.

### **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 § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying 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 substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant kissed a dying resident on the forehead one to two times several months prior to the final incident and again July 11, 2016, after the resident's complaint about it after she refused to leave his medication in his room. The employer classified her actions as sexual harassment and unwelcome sexual contact and terminated her employment.

There is a difference between kissing a dying resident on the forehead in an effort to comfort him and intentionally sexually harassing him. The resident did not have family to ease his physical and emotional pain and the claimant was attempting to do so. The claimant described the kisses on the forehead as the same type she would give her children and had no intention of making him uncomfortable. It is also telling about the nature of the kisses that the resident did not complain about them at the time the first two occurred several months earlier but only complained about the kiss on July 11, 2016, after the claimant would not leave his medication in his room like he asked.

The claimant's actions fall more within the realm of compassion rather than sexual harassment. Under these circumstances, the employer has not met its burden of proving intentional disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

**DECISION:**

The August 30, 2016, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/pjs