

**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**

**NIOLE M HANSON
919 – 7TH AVE N
FORT DODGE IA 50501-2614**

**NORTHWOODS LIVING INC
1470 – 21ST AVE N
FORT DODGE IA 50501**

**Appeal Number: 06A-UI-05360-S2T
OC: 04/16/06 R: 01
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:

Northwoods Living (employer) appealed a representative's May 16, 2006 decision (reference 01) that concluded Nicole Hanson (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 14, 2006. The claimant participated personally. The employer participated by Deb Koestner-Trexler, Intermediate Care Facility for Persons with Retardation Services Director; Vicki Freeman, Qualified Mental Retardation Professional; Mindy Read, Program Coordinator; Lynnette Geopfrt, Developmental Assistant; Samantha McFarland, Developmental Assistant; and Patricia Richman, Program Technician.

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 October 3, 2001, as a full-time program technician. The employer issued the claimant a written warning on February 1, 2006, for properly reported absenteeism.

The claimant attended a class on November 8, 2005, regarding proper restraining techniques. Each resident had a plan regarding his particular means of restraint. The claimant cared for a resident who needed to be restrained once or twice per week because he engaged in self-injurious behavior. This resident's plan indicated he was not to be talked to while restrained. Some staff regularly ignored this point and talked to the resident and rubbed his head, ears and the hair between his eyes.

On April 5 and 7, 2006, the claimant reported a work-related injury to the employer. On April 13, 2006, the employer began to question staff members about the claimant's job performance. On April 14, 2006, the employer suspended the claimant from working. The employer found the claimant had talked to the resident and rubbed his head, ears and the hair between his eyes while performing a restraint. The employer also found the claimant had used her cellular telephone while on duty. The employer terminated the claimant on April 24, 2006.

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 claimant was injured while at work and properly reported that injury. Shortly thereafter the employer terminated the claimant. Where disability is caused or aggravated by the employment, a resultant separation is with good cause attributable to the employer. Shontz v. Iowa Employment Security Commission, 248 N.W.2d 88 (Iowa 1976). 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). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The claimant was terminated for performing her duties in the same manner as at least two other staff members. The employer never warned her that she could be terminated for further infractions. The employer never warned her she could be terminated for using her cellular telephone while on the job. The employer terminated the claimant after one incident of poor performance. The employer did not provide any evidence of intent at the hearing. When an employee is performing work in a generally accepted way, she deserves the right to be warned that her conduct will not be tolerated in the future. No warning was given. Consequently the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 16, 2006 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible

bas/pjs