

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DEBRA L MOSHER**  
Claimant

**APPEAL NO. 13A-UI-01283-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NEW HOPE VILLAGE INC**  
Employer

**OC: 01/06/12  
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 31, 2013 (reference 01) decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on March 5, 2013. Claimant participated and was represented by Joseph Halbur, Attorney at Law. Employer participated through human resources director Sonya Stearns, residential supervisor Melissa Krula, and speech language pathologist and leader of dysphasia (swallowing disorder) team Gayle Levis. Claimant's Exhibit A (100 – 104) was received. Employer's Exhibit 1 (pages 1 – 5) was received.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a client support staff from December 7, 2004 and was separated from employment on January 8, 2013. On January 3, 2013 claimant allowed client Mike to eat part of a pork tenderloin against doctor's orders for ground meat because of a choking hazard due to Mike's dysphasia. Krula heard a staff member Deb Crisp, who was supervising another table, calling for help. Krula reported to the dining room and took the meat from Mike while claimant was sitting at the same table eating her own sandwich. Krula confronted claimant who said she was going to wait for him to calm down first before taking it away. Claimant argued that she had no chance to get the sandwich away from him but the cart with the extra meat was three feet from her and five feet from him and she waited while he ate two bites. By then Krula had arrived and intervened. Claimant also argued that she was concerned for her safety if Mike became upset for taking away the sandwich but had never completed an incident report that Mike had pushed her down and there were no other staff reports of Mike biting or pushing.

She had been warned in writing on November 12, 2012 about allowing client Terry to have a full cup of water and a full cup of milk on November 7 contra to medical instruction to allow only a quarter cup at a time because of his choking risk. When confronted, her response was "oh he can chew just fine."

She was warned in writing on August 27, 2012 about an August 22 meal observation where she assisted client Stewart eat a piece of meat not cut into specified bite-sized pieces ½ inch by ½ inch. Her response when confronted was, "He usually spits it out if it is too big to chew." Levis and Krula warned claimant verbally and trained her 20 times, including May 21, 2012, about the importance and requirement to follow dietary orders.

On July 11, 2012 she was warned about chastising another employee about following meal procedures. Levis warned her verbally in a staff evaluation on June 20, 2012 about giving a client a half cup rather than one ounce of a laxative. Levis trained her again on proper measurements. She had been verbally warned on May 14, 2012 about not following a ground meat diet ordered for client Jill for a second sandwich portion. On January 18, 2012 she was verbally counseled for not cutting up vegetables for Cindy per dietary orders. Client dietary information sheets are kept in a folder in the dining room. She had demonstrated the ability to follow the dietary orders apart from these occasions.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

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.

The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer has presented substantial and credible evidence that claimant repeatedly failed to follow and deliberately disregarded medical dietary orders causing risk of harm to the employer's clients after dozens of verbal warnings and multiple written warnings. Her claim that Mike may become upset and harm her is not credible as there were no incident reports filed and Krula had no problem removing the sandwich from him, while claimant did not even attempt to do so but sat passively eating her own sandwich. Claimant actively and passively ignored the duty of care in the performance of her work duties she owed to the employer and its clients. This is intentional, disqualifying job related misconduct. Benefits are denied.

**DECISION:**

The January 31, 2013 (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs