

**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**

**DONA MILTON
442 – 15TH AVE S
CLINTON IA 52732**

**SKYLINE CENTER INC
PO BOX 3064
CLINTON IA 52733-3064**

**Appeal Number: 05A-UI-05961-ET
OC: 05-08-05 R: 04
Claimant: Respondent (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
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 22, 2005. The claimant participated in the hearing. Lisa Hammond, Human Resources Manager; Lynn Hilgendorf, Community Living Director and Jennifer Krogman, Community Living Lead Supervisor, participated in the hearing on behalf of the employer.

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 direct care manager for Skyline Center from April 28, 2004 to May 9, 2005. The claimant bid for a full-time position as a direct care manager and as a result she was required to take additional home health care training. At the end of the first day of training May 5, 2005, the claimant approached the employer and stated she was not interested in finishing the class because she could not provide "personal care" to male clients. As a part-time employee the claimant worked with higher functioning individuals, 90 percent of whom she estimated were female. She also usually worked with a male employee and would have him take care of the personal needs of the male clients when necessary or if that were not possible she would say the individual did not need personal care. The employer was not aware of that situation prior to the claimant making that admission after the first day of taking the training class. The claimant's new position would have involved her working in a home with five people, two of whom were men that needed help in taking care of their personal needs. The claimant stated she did not want to shower or bathe males and would not give "hand-on showers" to the male residents. She would also have faced difficulty cleaning male residents who experienced toileting accidents. The claimant stated she was concerned she could be charged with a sexual abuse offense if she touched male clients in their genital area and because she has children she "could not go to prison for ten years." The employer explained there are protocols to follow and failure to provide those services to male clients could be considered dependent adult abuse by neglect. Because the claimant refused to perform an essential function of her job, the employer terminated her employment on May 9, 2005.

The claimant has claimed and received unemployment insurance benefits after the separation from employment.

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 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. IDJS, 321 N.W.2d 6 (Iowa 1982). While the claimant refused to provide personal care to male clients, that was an essential function of her job and she knew, or should have known, that type of care would be required of any health care worker. Although she contends she would have subjected herself to criminal sexual abuse charges by providing such care to male clients, her concerns were not reasonable as it is not logical to believe the State would charge a caretaker with sexual abuse under the circumstances of providing legitimate health care services while not charging that worker with neglect if she failed to provide personal care to male clients. Additionally, the claimant's request that the employer return her to her previous position, was an unrealistic suggestion given the fact that the claimant admittedly would not provide personal care to male clients and that would have been required of her previous, part-time job as well. The claimant's actions were not an isolated incident and her conduct in refusing to provide required care to clients demonstrated a willful disregard of the standards of behavior the employer has the right to expect of employees and shows an intentional and substantial disregard of the employer's interests and the employee's duties and obligations to the employer. Consequently, the administrative law judge concludes the employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Benefits are denied.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The May 24, 2005, reference 01, decision is reversed. 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. The claimant is overpaid benefits in the amount of \$1,644.00.

je/pjs