

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DAYNA ROSENBAUM**  
Claimant

**APPEAL NO: 12A-UI-02888-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AASE HAUGEN HOMES INC**  
Employer

**OC: 02-15-12**  
**Claimant: Respondent (2-R)**

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 March 15, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 6, 2012. The claimant participated in the hearing with CNA Emily Wagner. Mary Oyloe, DON; Rhea Hertramps, CNA; and Tanya Donlon, LPN, participated in the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

**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 LPN for AASE Haugen Homes from March 22, 2011 to January 24, 2012. On August 17, 2011, the claimant received a written warning for leaving the premises without clocking out or telling the other nurses she was leaving the building (Employer's Exhibit One). On September 29, 2011, the claimant received a written warning for failing to supervise a resident who was allowed to self-administer her medication (Employer's Exhibit Two). The claimant signed off that the resident took her PM medications, but actually she did not take them and the AM medications were repeated (Employer's Exhibit Two). As a result, the resident's physician had to be contacted and she had to be frequently monitored over the following 24 hours (Employer's Exhibit Two). On January 21, 2012, the claimant was scheduled to work 2:00 p.m. to 10:00 p.m. She was upset when she arrived at work and was using profanity. Rhea Hertramps, CAN, and Tanya Donlon, LPN, were at the nurses' station getting ready for shift change, as they worked the 6:00 a.m.-to-2:30 p.m. shift. The claimant was told she had made a medication error and became more upset. During their conversation the claimant said she was going to get a resident with dementia who was sitting in a recliner near the nurses' station "riled up." She indicated on shower nights she sometimes tells him she is "going to fuck" him to get him "riled up" and he says he "can't handle her." When asked why she would do that, she said because she was bored and it was funny. The other two employees

were shocked and appalled by her statements. Ms. Donlon was training a new employee and they went on break. The trainee asked Ms. Donlon what she was going to do about the claimant's remarks and Ms. Donlon said she was not sure but then went back and called the on-call nurse and told her what happened. Ms. Hertramps reported the claimant's statements to the DON right away and all three witnesses were instructed to provide written statements regarding the situation. After reviewing the witness statements and speaking to the claimant, the employer terminated the claimant's employment January 24, 2012, for a Group III offense of "actual or threatened abusive treatment of others (physical, mental, sexual and/or verbal abuse," which is grounds for immediate termination (Employer's Exhibit Five).

The claimant has claimed and received unemployment insurance benefits since her separation from this employer.

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

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job 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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant denies making the sexually suggestive remarks to the resident on shower nights because she was bored and found it funny,

the witnesses' testimony was credible, and it is difficult to imagine they would conspire and make up a story that specific and damaging to the claimant with whom they did not have any personal issues. The witnesses were shocked and appalled by the claimant's statements and her behavior was inappropriate and unprofessional, to say the least, as well as downright cruel. As a nurse, the claimant had a high duty to care for the residents in a humane and kind manner, being mindful of their afflictions, and not take advantage of their illnesses and helpless state to "rile" them up for fun. Under these circumstances, the administrative law judge concludes the claimant's conduct 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. The employer has met its burden of proving disqualifying job misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Therefore, benefits are denied.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code section 96.3-7. In this case, the claimant has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

**DECISION:**

The March 15, 2012, 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 has received benefits but was not eligible for those benefits. The matter of determining the amount of the overpayment and whether the overpayment should be recovered under Iowa Code section 96.3-7-b is remanded to the Agency.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/kjw