

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

ROSEMARIE A STORM
215 – 5TH ST SE
MASON CITY IA 50401

CARE INITIATIVES
c/o TALX UC EXPRESS
f/n/a JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 05A-UI-03117-DT
OC: 02/13/05 R: 02
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

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's March 17, 2005 decision (reference 01) that concluded Rosemarie A. Storm (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 13, 2005. The claimant participated in the hearing. Dawn Fox of TALX UC Express formerly known as Johnson & Associates appeared on the employer's behalf and presented testimony from two witnesses, Jack Musker and Diana Klimer. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on March 21, 1989. As of April 1, 2004 she worked full time on a day shift as a certified nursing aide (CNA) at the employer's Avoca, Iowa long-term care nursing facility. Her last day of work was January 29, 2005. The employer discharged her on February 11, 2005. The reason asserted for the discharge was unacceptable work performance involving safety violations and the making of unkindly remarks.

The claimant had been given some prior counseling, including June 20, 2004, when the claimant had in jest pulled a resident's blanket over his head, as the resident had a habit of covering his head with a blanket. Another counseling was on August 2, 2004 for the use of profanity, which the claimant denied. On January 13, 2005, a resident was arriving at the facility in a van and the claimant commented to another employee that the resident was arriving, then saying, "do you care?" and then giggling. On January 20, 2005, the claimant had given a resident a shower and taken the resident back to their room, intending to return with another resident. After leaving the shower room she failed to pull the door closed behind her as was procedure, so the room was unlocked for approximately ten minutes. Through the shower room there was also access to a cupboard containing hazardous materials.

The final incident that led to the claimant's discharge occurred on January 29, 2005. The claimant was scheduled to work 6:00 a.m. to 2:00 p.m., but because of low resident census, she was supposed to leave by 1:30 p.m. Shortly before leaving, she and another CNA put a resident to bed who had recently had hip surgery. Proper procedure in such a case would be to put the bed in its lowest position, to place a mat beside the bed, and to set an alarm that would go off if the resident fell. Ms. Klimer, the LPN charge nurse, came on duty as the claimant was leaving. She found the resident had not been put to bed with the proper safeguards and reported the matter to the administrator, Mr. Musker.

The claimant went to the hospital on January 30, 2005 with influenza, and was hospitalized for four days. She then recuperated at home for another week. The employer had not wanted to discuss the situation with the claimant while she was sick, and so waited until the claimant contacted the employer on February 10, 2005 indicating she was ready to return to work. A meeting was set up for the following day, February 11, 2005, at which time the claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the

employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is primarily her work performance, specifically the incident with the hip surgery resident on January 29, 2005. The mere fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly ensure that the safety measures were completed before she left; while she has not claimed the excuse of feeling ill, given her hospitalization the next day, it is likely that the oncoming illness could have affected her performance. Under the circumstances of this case, the claimant's failure on January 29, 2005 was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's March 17, 2005 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/pjs