

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SHERRI L KERR**  
Claimant

**APPEAL NO. 12A-UI-11791-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HEGG MEMORIAL HEALTH CENTER**  
Employer

**OC: 09/02/12**  
**Claimant: Appellant (2-R)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated September 21, 2012, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 30, 2012. Claimant participated. The employer participated by Mr. Glen Zevenbergen, CEO.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Sherri Kerr was employed by Hegg Memorial Health Center from April 10, 2006 until June 22, 2012 when she resigned in lieu of being discharged. Ms. Kerr was most recently employed as a full-time director of nursing and was paid by salary. Her immediate supervisor was Mr. Glen Zevenbergen.

A decision was made to terminate Ms. Kerr from her position with Hegg Memorial Health Center on June 22, 2012 when the employer concluded that Ms. Kerr no longer had the ability to function as an effective leader in the position of director of nursing. A decision was then made to terminate Ms. Kerr from her employment. The claimant was given the option of resigning in lieu of being discharged and did so.

On June 22, 2012 it was noted that Ms. Kerr once again was displaying a bandage on her arm. The employer and staff were aware that Ms. Kerr had been engaging in hurting herself and was being treated by a mental health practitioner for her psychological issues. Ms. Kerr had been counseled by the company's CEO about the bandages and her conduct and its effect on her job.

Leading up to the discharge on June 22, 2012, the employer had been concerned about Ms. Kerr's conduct and demeanor on a number of occasions. In December 2011 the claimant had been warned for reporting to work under the influence of prescription medications and had also been warned for acting in an insubordinate way towards Mr. Zevenbergen when he attempted to counsel Ms. Kerr. Claimant had also been counseled about continuing to text her primary care physician who was also affiliated with the health center. It appears Ms. Kerr's physician had complained about her conduct. A warning had also been issued for what the employer considered to be an inappropriate hand gesture that Ms. Kerr had given to another nurse.

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

The question before the administrative law judge is whether the evidence in the record establishes intentional, disqualifying conduct sufficient to warrant the denial of unemployment insurance benefits. It does 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.

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). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the

denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge may not necessarily be serious enough to warrant a denial of job insurance benefits. Such misconduct must be “substantial.” Unacceptable work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation.

In this matter the employer made a management decision to separate Ms. Kerr from her position as director of nursing based upon its reasonable conclusion that the claimant had lost her effectiveness as a manager due to her personal conduct. The employer concluded that based upon the claimant's practice of hurting herself and wearing bandages where other employees could see that she had engaged in that behavior was undermining Ms. Kerr's management authority. The employer was also aware that the claimant had engaged in a number of other previous activities that were both unusual and contrary to health center policies. The employer was aware that Ms. Kerr was under the care of psychological practitioners due to ongoing serious psychological issues and was aware that the claimant's self hurting was the result of the claimant's psychological issues and, therefore, was not a volitional act by the claimant.

The question before the administrative law judge is not whether the employer made a sound decision in discharging the claimant but whether the claimant was discharged for reasons that are disqualifying under the provisions of the Employment Security Law. While the employer's decision to terminate Ms. Kerr appears to be a sound decision from a management viewpoint, the evidence in the record does not establish intentional, disqualifying misconduct. The claimant's most recent conduct was due to reasons beyond the claimant's control at that time and therefore was not intentional, disqualifying misconduct. The claimant's separation from employment, therefore, was not disqualifying under the provisions of the Employment Security Law. The administrative law judge, however, does conclude that there may be an issue with the claimant's ability to work and remands to Workforce Development that issue for investigation and the issuance of appealable determination on whether the claimant is able and available for work within the meaning of the Employment Security Law.

**DECISION:**

The representative's decision dated September 21, 2012, reference 01, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed,

provided the claimant meets all other eligibility requirements of Iowa law. The issue of whether the claimant is able and available for work is remanded to the UIS Division for investigation and the issuance of an appealable determination.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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