BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

STEPHANIE M CALKINS	:	
	:	HEARING NUMBER: 09B-UI-10988
Claimant,	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
PRAIRIE VIEW OF CRESTON LLC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-a

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Stephanie Calkins worked as the manager of Prairie View of Creston (Employer) from October 2006 until the date of her discharge on October 22, 2008. (Tran at p. 1-2; p. 45; p. 61). The Claimant was terminated for the stated reasons of poor performance, violating policy, making unilateral decisions contrary to policy, and withholding information from superiors. (Tran at p. 2; p. 61; Ex. 3). Les Robbins is the Chief Financial Officer of the Employer. (Tran at p. 1).

The Employer is an assisted living program [ALP] established under Iowa Code chapter 231C. (Tran at p. 1; Ex. 2). The Department of Inspections and Appeals [DIA] regulates ALP's operated within Iowa.

Iowa Code chapter 231C (2009); 321 IAC ch 25. Regulations promulgated by the Department of Elder Affairs, under the former regulatory scheme, remain effective. 2007 Iowa Acts, ch. 215 §206. As part of the certification and recertification process, an ALP is monitored. If regulatory insufficiencies are identified as a result of an on-site monitoring then the ALP is given the opportunity to submit a "plan of correction" to the agency. 321 IAC 25.5(5); 25.8(3). Also a finding of regulatory insufficiency may be informally reviewed by the DIA in a statutorily set procedure. Iowa Code §231C.8. When a plan of correction is rejected then the agency may take that into account when making a certification decision. See 321 IAC ch. 25; ch. 26 [hearing procedure]. Final findings are made public. Iowa Code §231C.9.

The Employer's job description for manager requires the manager to be a registered nurse, a licensed nursing home administrator, or a social worker with experience in the ALP field. (Ex. 2). The Claimant has none of these qualifications, which the Employer knew at the time of her hire. (Tran at p. 12; p. 52). The Claimant's background was in bookkeeping and accounting. (Tran at p. 52). The job description also requires that the manager "[m]aintain compliance with state and federal regulations." (Tran at p. 33-34; Ex. 2).

In February 2008 the Claimant purchased an unnecessary mixer so that residents could have fresh mashed potatoes rather than instant. (Tran at p. 5; p. 65-66). The Employer considered this to be an act of poor performance. (Tran at p. 5; p. 6). Several months before the termination, the Employer learned that the Claimant was supposedly allowing third shift workers to sleep on duty. (Tran at p. 4). The Claimant was told she should not allow this. (Tran at p. 4). The Employer is not sure whether the problem was corrected before the termination. (Tran at p. 4-5). The Employer also considered that the Claimant was making an unauthorized unilateral decision when she decided to hire licensed practical nurses (LPN) as staff members. (Tran at p. 6; p. 67). The Employer told her that LPN's weren't necessary. (Tran at p. 6; p. 67).

The Creston facility of the Employer opened in March 23, 2008. (Tran at p. 5; p. 65). The Claimant was trained in the interim by attending classes and visiting other facilities. (Tran at p. 5; p. 22). On July 12, 2008 the Employer was inspected by the state as part of the on-site monitoring procedure. (Tran at p. 7; *see also* 321 IAC 25.5(4)). This was an on-site monitoring evaluation performed as part of finalizing the certification of the Employer's Creston operation. (Tran at p. 7). As a result of the on-site monitoring evaluation, regulatory insufficiencies were found and a fine of $500 was proposed by letter sent August 7, 2008. (Tran at p. 7; p. 47; Ex. 3). The Claimant did not inform her superiors of this outcome. (Tran at p. 7; p. 13-14). The Claimant did not do so because she understood that as administrator she was to take care of the regulatory insufficiency and because she was unaware that she was expected to inform her superiors until the final outcome. (Tran at p. 48; p. 52-53; p. 69). The Employer has no rule specifically requiring the reporting of inspections or initial inspection reports. (Tran at p. 22). The Claimant submitted a plan of correction to the DIA on August 22, 2008. (Tran at p. 7; p. 13; p. 35; p. 47; p. 56; Ex. 3). After the initial plan was rejected by the agency, the Claimant consulted with other professional staff and submitted a revised plan of correction which was accepted by a final initial monitoring evaluation report on September 16, 2008. (Tran at p. 7; p. 13; p. 35; p. 47; p. 57; Ex. 3). In that report, which is made pubic by DIA, a $500 fine was assessed. (Tran at p. 7; p. 47; Ex. 3). The two-year certification was granted. (Tran at p. 47; p. 58). The Claimant notified Mr.

Robbins of this outcome on September 23. (Tran at p. 7; p. 14; p. 57; p. 70; Ex. 3).

Although the Claimant did not inform her superiors of the on-site evaluation, such an evaluation of a non-accredited facility is required before issuance of the initial certification. 321 IAC 25.5(4)(on-site required within ninety days from issuance of conditional certification). The Employer was aware that such an on-site evaluation had to be done. (Tran at p. 7).

On October 17, 2008 the Employer performed a management review of the Claimant. (Tran at p. 3; p. 15; p. 45; p. 59). The Claimant was placed on 90-day probation. (Tran at p. 15; p. 45; p. 59-60). She had received no prior warnings. (Tran at p. 6; p. 7, ll. 30-31; p. 8; p. 15; p. 46; p. 72). The Employer again reviewed the resident files on October 21, 2008. (Tran at p. 2; p. 6; p. 39-40; p. 44; p. 60; Ex. 5). At this point, the nurse at the Claimant's facility resigned. (Cert. Rec. at p. 60). This second review convinced the Employer that the Claimant should be terminated rather than merely placed on probation. (Tran at p. 2-4; p. 6-7; p. 8; p. 16).

In the resident files, the documentation errors included resident agreements which were not signed until after the residents had moved in. (Tran at p. 9; p. 37). Signatures were missing on some of the agreements. (Tran at p. 18-19). Also charting wasn't done properly. (Tran at p. 10; p. 20; p. 37; p. 39). At one point the Claimant developed a "negotiated risk" without an RN who should be involved in the process. (Tran at p. 23-24). In some cases care plans were missing or incorrect. (Tran at p. 19; p. 37). Discharge plans, statements of tenants rights, consent to take photographs, living wills, do not resuscitate orders, service plans, and powers of attorney were missing from some files. (Tran at p. 21; p. 39; p. 41). Generally, the Claimant relied on the nurse for medical-related documentation, such as the care plan and the do not resuscitate. (Tran at p. 50; p. 62; p. 68). The Claimant did audit the files for substance but did not necessarily check for things such as signatures. (Tran at p. 49-50; p. 61-62).

In the employee files, the documentation errors discovered by the Employer included the failure to document background checks in the employee files. (Tran at p. 8-9). In general files were disorganized. (Tran at p. 10). Proper identification was missing from some of the employee files. (Tran at p. 10; p. 18). The Employer did not learn of these deficiencies in the employee files until after the Claimant was fired. (Tran at p. 73-74; p. 75).

The Employer was unable to prove that the Claimant made any of the errors relating to either resident or employee files as a result of intentional disregard of proper practices. (Tran at p. 16).

REASONING AND CONCLUSIONS OF LAW:

Standards For Misconduct: Iowa Code Section 96.5(2)(a) (2009) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in

and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 is the meaning which has been given the term in other jurisdictions under similar statutes, and we believe it accurately reflects 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

When an allegation of misconduct is based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Carelessness may be considered misconduct when an employee commits repeated instances of ordinary carelessness. Where the employee has been repeatedly warned about the careless behavior, but continues with the same careless behavior, the repetition of the careless behavior constitutes misconduct. See Greene v. Employment Appeal Board, 426 N.W.2d 659, 661-662 (Iowa App. 1988). "[M]ere negligence is not enough to constitute misconduct." Lee v. Employment Appeal Board, 616 N.W.2d 661, 666 (Iowa 2000).

Similarly, mere incapacity or incompetence is not disqualifying. 871 IAC 24.32(1)(a); Eaton v. Iowa

Dept. of Job Service, 376 N.W.2d 915, 917 (Iowa App. 1985); Newman v. IDJS, 351 N.W2d 806 (Iowa 1984); Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991). In order to prove that poor performance alone disqualifies a claimant what is required is proof that the poor performance was more than mere negligence or lack of skill. What is required is "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better than that at which [s]he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000).

After-Acquired Evidence: The Employer urged as justification for disqualification errors in the employee files that were only discovered after the Claimant was fired. These cannot be considered as justifications for disqualification.

"There must be a direct causal relation between the misconduct and the discharge... Simply put, we think an employer must establish that the employer discharged the claimant because of *a specific act or acts of misconduct*." West v. Employment Appeal Board, 489 N.W.2d 731, 734 (Iowa 1992)(emphasis in original); accord Larson v. Employment Appeal Bd., 474 N.W.2d 570, 572 (Iowa 1991) (record revealed claimant was fired for incompetence; claim that she was fired for deceit was supplied by agency post hoc); Lee v. Employment Appeal Board, 616 N.W.2d 661, 669 (Iowa 2000)(incident occurring after decision to discharge is irrelevant). The burden on the Employer is to prove that the Claimant was "discharged for misconduct". Iowa Code §96.5(2)(a). The Code does not state that the Claimant is disqualified if a termination would be justified by misconduct but only if the termination was "for" misconduct. After acquired evidence of misconduct is therefore not relevant. Lee at 669. ("The employer cannot now rely on such [prior misconduct] as additional proof of misconduct."). We thus concur with the Administrative Law Judge's conclusion that the errors which were discovered only after the termination are not relevant, except to the extent that these errors might affect our conclusion whether the other errors were intentional.

Poor Peformance: We focus our attention on the state inspection and on the documentation problems detected in October. The issues with the mixer, the hiring of LPN's, and allowing the third shift to sleep are considered only as background. The Employer knew of these long before the termination. They did not cause the termination. They are relevant therefore only to affect the seriousness of the acts that caused the termination. 871 IAC 24.32(8). This is particularly the case with the sleeping, since the Employer had no idea whether this problem had been resolved once the Claimant was told that she should not be allowing sleeping by third shift.

Looking at the remainder of the problems, it is clear that the documentation at the Claimant's facility was decidedly sub-par. It is also clear, however, that the Claimant tried her best but her best was not good enough. (Tran at p. 53-55; p. 72-73). The Employer has not established that the Claimant was purposely being lax, but only that she wasn't monitoring things as closely as the job required. That this was the result of incapacity and not intentional conduct is bolstered by the fact that the Claimant apparently never demonstrated an ability to perform the job in a consistently satisfactory manner despite her efforts. She spent a weekend auditing files and still got fined on Monday. She wrote a plan of correction and still didn't get it right until she got some help from Ms. Stone. We do not have "quantifiable or objective evidence that shows [the Claimant] was capable of performing at a level better

than that at which [s]he usually worked." Lee v. Employment Appeal Board, 616 NW2d 661, 668 (Iowa 2000). The facts do not support any finding of deliberate errors by the Claimant nor negligence of such a degree as to manifest equal culpability.

Kelly v. Iowa Dept. of Job Service, 386 N.W.2d 552 (Iowa App. 1986) is helpful in this case. In Kelly the claimant was terminated because he inadequately cleaned the school stage. Mr. Kelly had previously been warned about poor performance. Mr. Kelly testified that he tried to do the best job he could. The Board in Kelly had found misconduct based on the employer's testimony that Mr. Kelly was capable of doing a good job of cleaning but did not. The Court of Appeals reversed the finding of misconduct on the

basis that the Employer's opinion that a Claimant could do better was inadequate to prove misconduct. To hold otherwise would mean that "[e]very employer could defeat an unemployment claim by merely testifying that an employee was capable, didn't do the job to the employer's satisfaction, and was therefore guilty of misconduct." Kelly at 555. The Court thus held that "[t]he employer's subjective judgment is proof of dissatisfaction but, without more, is not proof of misconduct." Id. Here, again, we have no objective proof that the Claimant was intentionally under performing but only that she wasn't doing the job to the level that the Employer felt it needed. This is not disqualifying.

We note that some of the more serious problems attributed to the Claimant were actually duties to be performed by subordinate staff – some of whom had more training in health care than the Claimant. (Tran at p. 20-21; p. 50; p. 62). We understand the point of the Employer that a manager bears ultimate responsibility. (Tran at p. 62). But failing to live up to your responsibilities is not the same as an intentional and willful disregard of the Employer's interests. Of course, a failure to act can constitute misconduct but again only if the failure is a failure of the claimant to personally do some act. In other words, a claimant cannot vicariously commit misconduct. It is not enough that a bad thing happened. To find misconduct we need to point to some act or omission of the Claimant that led to the problem. If the problem is traceable to a subordinate of the Claimant then we still need to find something the Claimant did that led to this error by the subordinate. We would need to find, for example, a willful failure to train the subordinate, a willful failure to correct previous errors by subordinates, a willful failure to share information, a willful failure to implement management controls, etc. There is simply not adequate proof of this in the record.

It is also very significant that the job of manager of an ALP is one requiring a high level of skill and ability. The logistical challenges of such a position are beyond the ability of most people. For an unlicensed inexperienced person, such as the Claimant, the challenges are multiplied. This effect is increased where the facility has been newly opened and thus has no established practices in place for the Claimant to inherit. These challenges faced by the Claimant tend to bolster our conclusion that the Claimant was not guilty of willful misconduct or of equally culpable negligence. She was guilty of not being able to handle the job, and of nevertheless trying to. This is not misconduct.. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988); 871 IAC 24.32(1)(a).

Handling of On-Site Evaluation: We find that the Employer has failed to prove that the Claimant's failure to inform the Employer of the regulatory insufficiencies was not in good faith. She was the

administrator and she understood that it was her responsibility, with assistance from co-workers, to come up with a plan of correction. (Ex. 2). This is what she did. The Claimant credibly testified that she did not think she was required to inform her superiors of the on-site monitoring or of the regulatory insufficiency. Moreover an on-site monitoring of a new (non-accredited) facility is a regulatory requirement. Since the Claimant had every reason to think that the Employer would know of the on-site monitoring evaluation, her decision not to tell them of the specific date the inspector was on-site appears to have been in good faith. Thus the Employer has failed to show that the Claimant's decision not to specifically inform her superiors of the inspections or the regulatory insufficiency was made in anything but good faith. Her decision may have been an error but "good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute." 871 IAC 24.32(1)(a).

Conclusion: The Board understands that the issues raised by the Employer are *extremely important* to caring for our elder citizens. We also appreciate that state regulations are involved. This is often the case. Food safety regulations, medical standards, rules of the road, gambling regulations, and privacy regulations are a few examples of the sort of laws that are frequently implicated in cases where an employee makes errors and has been unable to perform up to expectations. In Lee itself, the claimant doubtlessly violated the duty to keep a proper lookout while driving. Deaths can result from negligent driving, and yet negligent driving is often not disqualifying. We do not question the decision to terminate a worker for errors that create a violation of state regulation. This may very well be a compelling reason for a termination. But while the Employer may have compelling business reasons to terminate the Claimant, "[m]isconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of benefits." Lee v. Employment Appeal Bd. 616 N.W.2d 661, 665 (Iowa 2000); Budding v. Iowa Department of Job Service, 337 N.W.2d 219, 222 (Iowa App. 1983). Thus, in any case, the issue is not the importance of the policy the Claimant violated. The issue is whether the Employer has proved by a preponderance of the evidence that the Claimant committed intentional misconduct or repeated negligence of equal culpability. We conclude that it has not and benefits are therefore allowed.

DECISION:

The administrative law judge's decision dated March 12, 2009 is **REVERSED**. The Employment Appeal Board concludes that the claimant was discharged for no disqualifying reason. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE KUESTER :

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique Kuester

AMG/kjo