

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

KATHY S HEKTER
3025 – 250TH ST
LOGAN IA 51546-5007

MOSAIC
c/o TALX U C EXPRESS
f/k/a JOHNSON & ASSOCIATES
PO BOX 6007
OMAHA NE 68106-6007

Appeal Number: 06A-UI-05408-DT
OC: 04/23/06 R: 01
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:

Mosaic (employer) appealed a representative's May 11, 2006 decision (reference 01) that concluded Kathy S. Hekter (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 June 12, 2006. The claimant participated in the hearing. Lynn Corbeil of TALX UC eXpress, f/n/a Johnson & Associates, appeared on the employer's behalf and presented testimony from three witnesses, Jim Poehlman, Angela Wall, and Donna Norris. During the hearing, Employer's Exhibits One and Two were entered into evidence. 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's intensive care facility providing services to persons with disabilities on September 8, 1997. She worked full time; prior to January 29, 2006, as a direct support associate, and since January 29, 2006, as a direct support professional. Her last day of work was April 15, 2006. The employer suspended her that day and discharged her on April 25, 2006. The reason asserted for the discharge was unprofessional conduct.

The claimant was working with a non-verbal client doing some range of motion exercises involving both his upper and lower extremities. There were home exercises that had been prescribed by a physical therapist for the client, with notations of special considerations. However, some of the exercises that were prescribed could not be performed precisely as pictured in the home exercises directly because of the client's physical disabilities. The claimant had personally made her own adaptations to the exercises based upon adaptations shown to her by a nurse with another client.

On April 15 the claimant was performing the leg exercises and was at a point of having the client's knee and leg fully extended to the side when she sneezed. The pressure of the sneeze caused her to momentarily further extend the position of the client's knee and leg. She heard a "pop" and immediately indicated concern to Ms. Norris, a direct support associate, who was nearby, that she may have injured the client. She then immediately proceeded to contact her direct supervisor, who arranged for someone to come and do an evaluation.

While the claimant was waiting for someone to come and do the potential injury evaluation, she detected that the client had completely soaked his undergarments. Concerned about the potential health and regulatory consequences of the client staying in wet undergarments, she changed the undergarments, believing that she was adequately bracing and stabilizing the client's leg while doing so. After the assistant facility director came and did the evaluation, the client was taken by ambulance to the hospital for full evaluation and treatment; it was discovered that he had suffered both a dislocated hip and a fractured femur. The probability is that at least the dislocated hip occurred at the time of the "pop." The employer speculated but provided no specific evidence that the fractured femur did not occur at that time, but occurred while the claimant was changing the client's undergarment.

Because of the injury, the claimant was suspended pending investigation. Because the employer determined that the claimant had performed a range of motion exercise that was outside that specified in the treatment plan and that she had not properly followed standard first aid practices by moving the presumably injured client in order to change the undergarments, she was discharged. The claimant had not had any prior incidents or warnings with regard to injuries or professional procedures.

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 unprofessional conduct that resulted in the injury of the client on April 15, 2006. While the outcome to the client was regrettable and could certainly provide good cause to the employer to discharge the claimant, under the circumstances of this case, the claimant's actions that day were the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and were a good faith error in judgment or discretion. There is no evidence the claimant intentionally disregarded her duty of care to the client to provide the level of volition necessary to establish misconduct. Huntoon, supra. The employer has not met its burden of proof 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 May 11, 2006 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/kkf