

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

KIMBERLY D EDWARDS

Claimant,

and

LUTHERAN HOME FOR THE AGED

Employer.

:
:
:
:
:
:
:
:
:

HEARING NUMBER: 11B-UI-03378

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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, 96.3-7

DECISION

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Kimberly D. Edwards, worked for Lutheran Home for the Aged (a skilled nursing facility) from October 8, 2008 through February 3, 2011 as a full-time Director of Nursing (DON). (Tr. 3, 8) When patients first enter this facility, each person is required to make a determination as to whether in the event that patient's heart stops or that patient stops breathing, each has an advance directive in writing that contains instructions to either resuscitate or do not resuscitate (DNR). (Tr. 3-4) The hospital has a policy that requires staff to perform CPR emergency treatment when a patient is full code. (Tr. 5- 6) All staff are trained on how to perform CPR and what measures to take in such instances. (Tr. 17)

On January 22nd, Ms. Edwards received a call while off duty to come to the facility because a patient was full code and the staff was unsure what to do. (Tr. 4, 9) The claimant directed the staff person to get a nurse in the room and "...call me if you need me." (Tr. 10) The patient had been at the dinner table, when he raised his hand "...like a child in class and then slumped over..." (Tr. 9-10, 18) Staff carried him to his bed and put him on oxygen. (Tr. 10) Approximately 10 minutes after the staff's initial call, the CNA called Ms. Edwards back and requested that she come to the facility. (Tr. 10) When the claimant arrived, she directed the staff (2 CNAs and a nurse) not to do CPR (Tr. 4, 7) because "...he looked like [he] had already [died]...his eyes were fixed and dilated...face was flat...no respiration..." (Tr. 10, 17) Ms. Edwards obtained a stethoscope and cuffs to do the patient's vitals. (Tr. 10) She heard "...an agonal beat which [was] not uncommon after somebody has died...the heart is just relaxing." (Tr. 10) Sixteen minutes had elapsed between the time the patient went into cardiac arrest and the claimant's arrival at the facility. (Tr. 11, 15)

When Ms. Edwards reported to work the following Monday, the employer placed her on administrative leave for a week and a half. (Tr. 7, 9, 13) She was then asked to resign; however, she refused and was subsequently terminated. (Tr. 13) The employer had never issued any prior warnings to the claimant. (Tr. 8)

REASONING AND CONCLUSIONS OF LAW:

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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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).

Although the employer argues that Ms. Edwards did not follow the employer's policy to administer CPR to full code patients, the claimant provided a cogent argument as to the mitigating circumstances that led to her decision not to perform CPR. The record establishes that once the patient coded, no action was taken on the part of any other staff members present (2 CNAs and a nurse) prior the claimant's arrival. (Tr. 11, 17) Each of these persons had been trained in CPR as well as knew the proper procedure to follow in the event of a full code. (Tr. 5-6, 17) By the time Ms. Edwards arrived, approximately 16 minutes had elapsed from the time the trauma began and when she got there to assess the situation. (Tr. 11, 15) It was not unreasonable for her to believe that the patient had already passed based on her initial observation, i.e., the patient's pupils were fixed and dilated, and the patient had no vital signs. (Tr. 10, 17) Based on her professional experience as a nurse, she recognized that it was too late to start CPR, as the patient had been deceased too long. (Tr. 11).

While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). There is nothing in this record to establish that Ms. Edwards acted with any intention to disregard the employer's interests. For this reason, we conclude that the employer failed to satisfy their burden of proof.

DECISION:

The administrative law judge's decision dated April 11, 2011 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. 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.

Monique F. Kuester

The employer submitted a written argument to the Employment Appeal Board. The Employment Appeal Board reviewed the argument. A portion of the argument consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the argument and additional evidence were considered, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Monique F. Kuester

Elizabeth L. Seiser

AMG/fnv