

**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**

**LOUANN E KENNEDY
APARTMENT 6
420 B AVE NW
CEDAR RAPIDS IA 52405**

**HEARTLAND EMPLOYMENT SERVICES
c/o SHEAKLEY UNISERVICE
P O BOX 1160
COLUMBUS OH 43216-1160**

**Appeal Number: 04A-UI-00739-DT
OC: 12/14/03 R: 03
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:

Heartland Employment Services, doing business as HCR ManorCare (employer), appealed a representative's January 13, 2004 decision (reference 01) that concluded LouAnn E. Kennedy (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 February 12, 2004. The claimant participated in the hearing. Robyn Moore of Sheakley Uniservice appeared on the employer's behalf and presented testimony from two witnesses, Ted Biderman and Diane Langbehn. One other witness, David Snyder, was available on behalf of the employer but did not testify. During the hearing, Employer's Exhibits One through Three 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 on March 13, 2001. She worked full time as a certified nursing aide (CNA) in the employer's Cedar Rapids, Iowa long-term care nursing and rehabilitation center. Her last day of work was December 11, 2003. The employer suspended her that day and discharged her on December 16, 2003. The reason asserted for the discharge was inappropriate conduct toward residents.

The claimant worked an overnight shift from 10:00 p.m. to 6:30 a.m. On December 8 a nurse supervisor reported to Ms. Langbehn, the director of nursing, that during the claimant's shift that had begun on December 5 the claimant had been overly aggressive in turning over a resident for incontinence care, to the point of forcing the resident against the wall. When confronted by Ms. Langbehn, the claimant maintained she had never even attempted to change this resident alone, that she always only used the amount of force necessary to accomplish the task, and that she had not caused the resident to be pushed into the wall. Ms. Langbehn suspended the claimant while she pursued her investigation. The employer accepted the nurse supervisor's statement in part because of a prior warning that had been given to the claimant on August 25, 2003 for rough turning of a resident.

Subsequent to the suspension, a charge nurse reported to Ms. Langbehn that after the start of the shift that began the evening of December 10 the claimant had made a comment regarding a resident who had been getting out of bed and so had been placed in a wheelchair where the aides could monitor her. The resident's head was somewhat slumping. The charge nurse accused the claimant of saying that a rope or restraint strap should be put around the resident's neck and tied to a doorknob. The claimant denied having said this or anything like this; nor had she heard anyone else make this statement. The employer accepted the report in part because of a prior report in April 2003 that when asked how a resident had gotten on the floor had responded that she "did not know and did not care," which the claimant also denies having made.

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 Section 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 the conclusion that she had been excessively rough in her treatment of a resident and that she had made an

inappropriate and disrespectful statement regarding a resident. However, the claimant denied both of these allegations. No firsthand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the secondhand account from the nurses; however, without that information being provided firsthand, the administrative law judge is unable to ascertain whether the nurses might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witnesses might have misinterpreted or misunderstood aspects of their reports. Under the circumstances, the administrative law judge finds the claimant's firsthand information more credible. 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 January 13, 2004 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/s