

**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**

**HARRY L SAWICKI
APT 4
739 17TH ST
DES MOINES IA 50314**

**CENTRAL IOWA HOSPITAL CORP
c/o HUMAN RESOURCES
1313 HIGH ST STE 111
DES MOINES IA 50309-3119**

**Appeal Number: 05A-UI-08877-D
OC: 07/31/05 R: 02
Claimant: Appellant (2)**

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:

Harry L. Sawicki (claimant) appealed a representative's August 25, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Central Iowa Hospital Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on September 20, 2005. The claimant participated in the hearing. Barb Foertsch appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Five 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 April 28, 1988. He worked full time as a housekeeping technician in the employer's hospital facility. He worked an 11:00 p.m. to 7:00 a.m. schedule Monday through Friday. His last day of work was August 1, 2005. The employer discharged him on that date. The reason asserted for the discharge was unsatisfactory work performance.

The employer has four levels of discipline. The first level is a verbal warning. The employer had no documentation regarding the date or issue of any verbal warning to the claimant. He was given a second level discipline on October 14, 2004 for improper discharge cleaning, specifically missing blood spots and dirt. (Employer's Exhibit Three.) On May 31, 2005 the employer gave him the third level discipline for improper discharge cleaning. He had missed blood spots on walls and the bed on May 18, and on May 27 a room needed to be recleaned before it could be reused. (Employer's Exhibit Two.)

The claimant had been given performance evaluations in both 2004 and 2005 that indicated he did not meet standards with regarding to cleaning protocols. The supervisor's comments on the 2005 review, completed on June 16, 2005, were that "Harry is a cooperative employee, tries hard to do his best. Harry still need(s) to prioritize his workload to accommodate the discharge requests in a thorough manner." (Employer's Exhibits Four and Five.)

On July 27, 2005 the claimant was directed to do a discharge cleaning on a critical care room. He signed off as having completed the room. The next day, his department supervisor received a complaint from the nursing staff that the room still had blood on the walls and that there was trash in the room. As a result, the claimant was discharged. No detail of how much or a precise location of the spatter was provided. The claimant was not shown what he allegedly had missed, but he acknowledged that there was some possibility that he had missed blood spatter on a wall due to vision difficulties; he wears trifocal lenses. He also offered the possibility that the room had been used in the interim after he completed cleaning, or that the nursing staff had already been bringing a new patient into the room before he had completed final cleaning of the room, as that had occurred on various occasions. He acknowledged that he had been having increasing difficulty properly completing all cleaning assignments within the available time and that the employer was no longer providing him with additional assistance as it had in the past.

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 his unsatisfactory work performance. The fact that an employee might have various incidents of unsatisfactory job performance does not establish the necessary element of intent; misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra; Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). There is no evidence the claimant intentionally failed to properly perform his cleaning duties; in fact, the employer's evidence indicates that the claimant "tries hard to do his best." Under the circumstances of this case, the claimant's failure was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. 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 August 25, 2005 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs