

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

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KELLY R CHRISTENSEN

Claimant,

and

HOPE HAVEN INC

Employer.

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HEARING NUMBER: 09B-UI-00228

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**

**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, Kelly R. Christensen, worked for Hope Haven, Inc. from April 15, 2008 through November 14, 2008 as a full-time care coordinator. (Tr. 2, 10, 16) Part of the claimant's job responsibilities included going into the field, performing in-home skill development by visiting each of the eight families to whom she was assigned (Tr. 5-6) on a weekly basis. (Tr. 3, 22)

The employer had concerns regarding Ms. Christensen's work performance that prompted several meetings. (Tr. 5, 7, 8, 10-11) She sometimes had difficulty meeting with one of her families (hereinafter referred to as Family A) on a weekly basis because she was unable to contact them. (Tr. 11) The last contact she made with Family A was September 25<sup>th</sup>, 2008. (Tr. 24) Ms. Christensen had made several attempts, by phone or simply stopping by the home, but was unable to reach the family.

(Tr. 23) On occasion, she caught only the daughter at home; one time she met the mother at a restaurant, but this didn't constitute a family meeting. (Tr. 22)

On October 8<sup>th</sup>, the employer issued a verbal warning after meeting with the claimant, which involved her need to meet weekly with all families as well as her need for more explicit documentation (daily and 30-day reports) of those meetings. (Tr. 4-5, 18, 20) Ms. Christensen had no difficulty meeting with seven of her families on a regular basis. (Tr. 25) The employer did not warn the claimant that her job was in jeopardy because of her inability to meet with Family A. (Tr. 21)

On November 11th, 2008, Melinda Louscher (claimant's supervisor), confronted Ms. Christensen about her failure to make contact with Family A based on an e-mail the employer received from the Department of Human Services. (Tr. 3-4, 6-7, 12) Ms. Louscher also discussed the claimant's breach of confidentiality when she contacted an agency about this same client's daughter without a prior signed release to do the same. (Tr. 9), 17-18) The following day, the employer held a meeting with Ms. Christensen and her supervisor in which the employer confronted the claimant about the breach of confidentiality complaint. (Tr. 9, 17) The employer terminated the claimant based on her overall performance and breach of confidentiality.

#### REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2007) 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)).

Although the employer argues that Ms. Christensen had difficulty meeting her job requirements (weekly contacts with families, maintaining reports), the claimant refutes this allegation stating that she only had trouble with Family A, regardless of her numerous attempts. She denies receiving verbal warnings about her job performance and the employer failed to provide any documentation of these alleged numerous verbal warnings, which tends to corroborate her testimony. Additionally, the employer failed to provide documentation to establish that the claimant knew her job was in jeopardy. Instead, the employer's exhibits merely outline the contents of their discussions, the employer's expectations, and suggestions as to how she could improve her contacts and documentation methods.

As for the final incident, the claimant denied misrepresenting Family A when she met only the mother for a brief moment in the restaurant. She also indicated that she did not contact an agency as she was so accused; rather, she contacted the school guidance counselor after "... meeting with the parents, DHS worker and the child's attorney..." (Tr. 24). 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). 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 the record to show that Ms. Christensen's shortcomings were intentional; she performed her duties to the best of her abilities, though the employer was still unsatisfied. The claimant was, essentially, discharged for poor performance. The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. For this reason, we conclude that the employer failed to satisfy their burden of proof.

## DECISION:

The administrative law judge's decision dated January 23, 2009 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/fnv

**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.

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Monique F. Kuester

AMG/fnv