

**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**

**CAROLYN NIEHUS  
PO BOX 656  
REMSEN IA 51050**

**CORNERSTONE SENIOR COMMUNITIES  
OF REMSEN/HAPPY SIESTA HEALTH  
CARE CTR  
PO BOX 380  
REMSEN IA 51050**

**Appeal Number: 05A-UI-08873-JTT  
OC: 07/24/05 R: 01  
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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Carolyn Niehus filed a timely appeal from the August 19, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 13, 2005. Ms. Niehus participated and presented additional testimony through Leone Sand and part-time employee Linda Spieler. Administrator Charlotte Braun represented the employer and presented additional testimony through Director of Operations Larry Hinman. Exhibit A was received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Carolyn Niehus was employed by Cornerstone Senior Communities of Remsen as the full-time activities director at the Happy Siesta Healthcare Center from March 1, 1993 until Thursday,

July 21, 2005, when Administrator Charlotte Braun and Director of Operations Larry Hinman discharged her for misconduct. Happy Siesta is a nursing home with 78 beds and an average resident census of 68-70.

At the beginning of 2005, the employer was reviewing the operations at Happy Siesta for means by which to attract more residents and to reduce payroll expenses. The employer consulted with a nursing home consultant who recommended that the employer increase the number of activities made available to residents late in the afternoon. The employer also wanted to adjust the work hours of the activities staff so that they would coincide with the hours when the residents were awake and active. The activities department at Happy Siesta was targeted for payroll expense cuts. In January 2005, Director of Operations Larry Hinman issued a directive that Ms. Niehus and her assistants in the activities department would clock in at 9:00 a.m. and leave at 5:00-5:30 p.m. Ms. Niehus had previously been allowed to set her own hours and was in the habit of arriving at work at 6:30-7:30 a.m. and departing at 3:00-3:30 p.m., as soon as she had finished her duties. Ms. Niehus believed the employer's directive made it more difficult for her to complete her activities-planning and charting responsibilities.

Shortly after the directive went into effect, Ms. Niehus brought her concerns to the attention of Administrator Charlotte Braun. Ms. Niehus continued to set her own hours and arrive and leave earlier than the employer desired. Ms. Niehus advised Ms. Braun that some of the residents were not happy with the increased amount of activities scheduled in the afternoons.

On June 9, Ms. Braun reprimanded Ms. Niehus for failing to abide by the 9:00 a.m. to 5:30 p.m. schedule. At that time, Ms. Niehus asserted that she could not get her work done during those hours. Ms. Niehus advised Ms. Braun that she was no longer able to chart proper care plans for individual residents because the increase in the number of hours she was expected to be in direct contact with residents resulted in a decrease in the number of hours she had available for planning and record keeping. Ms. Niehus continued to set her own hours. Beginning on May 24, Leone Sand, who was the other full-time activities department staff person commenced a medical leave of absence. Ms. Sand continued on the leave of absence beyond the date on which Ms. Niehus was discharged.

Two days before Ms. Niehus was discharged, Director of Operations Larry Hinman met with Ms. Niehus for the purpose of making it clear to Ms. Niehus that he expected her to comply with the 9:00 a.m. to 5:30 p.m. directive. During the meeting, Mr. Hinman acknowledged that there were times when it would be appropriate for Ms. Niehus to go into work early. Ms. Niehus advised Mr. Hinman that she would need to do so on July 21.

Mr. Hinman contacted Administrator Charlotte Braun on July 21 to see whether Ms. Niehus had started complying with the 9:00 a.m. to 5:00 p.m. directive. Mr. Hinman had not heard or had forgotten that Ms. Niehus had previously advised of the need to go into work early on July 21. Mr. Hinman made contact with Ms. Braun, who advised that the time reporting system indicated that Ms. Niehus had clocked in at 6:52 a.m. Mr. Hinman then directed Ms. Braun to discharge Ms. Niehus.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Niehus was discharged for misconduct in connection with her employment.

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).

Since Ms. Niehus was discharged, the employer has the burden of proving she was discharged for misconduct that would disqualify her from receiving benefits. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982).

The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The weight of the evidence in the record does not establish that Ms. Niehus failed to follow the 9:00 a.m. to 5:00 p.m. directive on July 21. The evidence indicates that Ms. Niehus had advised Mr. Hinman of the need to start work early on July 21 and Mr. Hinman had acknowledged that there would be times when it would be appropriate for Ms. Niehus to start work early. The weight of the evidence also establishes that Ms. Niehus had good cause for wanting to start her workday earlier than the 9:00 a.m. to 5:00 p.m. directive allowed. Ms. Niehus was being asked to deliver more services with less staff. Ms. Niehus was being required to spend more time in leading resident activities at the expense of appropriate planning and recordkeeping. Ms. Niehus was forced to choose between competing interests of the employer. Ms. Niehus had apparently performed the work to the employer's requirements for almost 11 years. Though the employer was within its rights to discharge Ms. Niehus, the evidence in the record fails to establish substantial misconduct necessary to disqualify Ms. Niehus for unemployment benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Niehus was discharged for no disqualifying reason. Accordingly, Ms. Niehus is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Niehus.

DECISION:

The Agency representative's decision dated August 19, 2005, reference 01, is reversed. The claimant was discharged from her employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

jt/kjw