

CR 88-54

RULES CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPT. OF INDUSTRY,)
LABOR & HUMAN RELATIONS)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, John T. Coughlin, Secretary of the Department of Industry, Labor and Human Relations, and custodian of the official records of said department, do hereby certify that the annexed rule(s) relating to Misconduct: abuse of a patient of a health care facility were duly (Subject) approved and adopted by this department on November 22, 1988. (Date)

I further certify that said copy has been compared by me with the original on file in this department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the department at 4:00 p.m. in the city of Madison, this 22nd day of November A.D. 1988.

Michael W. Mahoney
Deputy Secretary

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4:20 pm
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ORDER OF ADOPTION

Pursuant to authority vested in the Department of Industry, Labor and Human Relations by section(s) 101.02(1), 108.09(5) and 108.14(2),

Stats., the Department of Industry, Labor and Human Relations creates;

amends; repeals and recreates; repeals and adopts rules of Wisconsin

Administrative Code chapter (s):

ILHR 132.001 and 132.05 Misconduct: abuse of a patient of a health care
(Number) (Title) facility

The attached rules shall take effect on the first day of the month following
publication in Wisconsin Administrative Register pursuant to section
227.22, Stats.

Adopted at Madison, Wisconsin, this

date: 11/22/88

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN
RELATIONS

Michael W. Muloney
Deputy Secretary

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RULES in FINAL DRAFT FORM

Rule: ILHR 132.001 and 132.05
Relating to: Misconduct: abuse of a patient of a health care
facility

The Wisconsin Department of Industry, Labor and Human Relations proposes an order to renumber ILHR 132.001(6), (7) and (8) to ILHR 132.001(9), (10) and (11); and to create ILHR 132.001(6), (7), (8), and 132.05.

* * * * *

Statutory authority: ss. 101.02(1), 108.09(5) and 108.14(2), Stats.

Statute interpreted: ss. 108.04(5), Stats.

Section 108.04(5), Stats., provides that a claimant who has been discharged for misconduct connected with his or her employment is ineligible for any unemployment compensation benefits from the discharging employer's account and from any other employer's account until he or she has requalified for benefits. The statutes do not define misconduct as it applies to unemployment compensation. The Wisconsin Supreme Court has defined misconduct as follows:

"Conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employe, or in carelessness or negligence of such degree or 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 employe's duties and obligations to his 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." Boynton Cab Co. v. Neubeck and Industrial Comm., 237 Wis. 249, 259-260 (1941).

Because this definition must be applied on a case-by-case basis, there has been concern over inconsistencies in decisions, specifically in decisions concerning employe abuse of health care facility patients. Section ILHR 132.05 provides a standard by which to determine if misconduct exists when an

employee is discharged for alleged abuse of any patient of any health care facility.

As in misconduct cases generally, the rule provides that the discharging employer has the burden of proving that the alleged conduct, which the employer believes amounts to misconduct, occurred. In addition, the rule provides that the admissibility of evidence and administrative notice rules of s. ILHR 140.12 apply to all cases involving patient abuse.

Section ILHR 132.05(2) identifies what may constitute patient abuse and is not intended to be exhaustive. Section ILHR 132.05(3) explains (a) that a claimant is eligible for unemployment compensation benefits if the conduct for which the employee was discharged is determined not to be misconduct and (b) that the claimant shall be ineligible for benefits consistent with s. 108.04(5), Stats., if the claimant was discharged for conduct amounting to misconduct.

SECTION 1. ILHR 132.001(6), (7) and (8) are renumbered ILHR 132.001(9), (10) and (11).

SECTION 2. ILHR 132.001(6), (7) and (8) are created to read:

(6) "Health care facility" means any nursing home, community-based residential facility, hospital, clinic, office of a physician or other health care professional, mental health institute, center for the developmentally disabled, alcohol or drug treatment center or other facility providing inpatient or outpatient health care to patients, whether licensed, approved or exempted under state law or certified under federal law.

(7) "Sexual contact" has the meaning designated in s. 940.225(5)(a), Stats.

(8) "Sexual intercourse" has the meaning designated in s. 940.225(5)(b), Stats.

SECTION 3. ILHR 132.05 is created to read:

132.05 MISCONDUCT: ABUSE OF A PATIENT OF A HEALTH CARE FACILITY. (1)
SCOPE. (a) After an employe has been discharged by an employing unit for misconduct connected with his or her employment, he or she is not eligible to receive unemployment benefits under s. 108.04(5), Stats. The Wisconsin Supreme Court has defined misconduct for unemployment compensation purposes to mean "conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of

behavior which the employer has a right to expect of his [or her] employe, or in carelessness or negligence of such degree or 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 employe's duties and obligations to his [or her] employer." The intent of this section is to ensure that the statutory provision and the court decision are consistently interpreted and applied in cases involving alleged abuse of a patient in a health care facility.

(b) This section provides a standard by which to determine if misconduct exists under s. 108.04(5), Stats., when an employe is discharged for alleged abuse of a patient of a health care facility. This standard also applies to disciplinary suspensions for misconduct under s. 108.04(6)(a), Stats.

(c) At any hearing involving this section, the health care facility shall prove by competent evidence that the alleged conduct for which the employe was discharged actually occurred. Section ILHR 140.12 regarding the admissibility of evidence applies in all hearings involving alleged abuse of a patient.

(2) STANDARD. Discharge of an employe by an employing unit for misconduct connected with his or her employment under s. 108.04(5), Stats., may include the discharge of an employe by a health care facility for abuse of a patient. Abuse of a patient includes, but is not limited to:

(a) Except when required for treatment, care or safety, any single or repeated intentional act or threat through contact or communication involving force, violence, harassment, deprivation, withholding care, sexual contact,

sexual intercourse, or mental pressure, which causes physical pain or injury, or which reasonably could cause physical pain or injury, fear or severe emotional distress;

(b) Any gross or repeated failure to provide treatment or care without good cause which reasonably could adversely affect a patient's health, comfort or well-being;

(c) Any intentional act which subjects a patient to gross insult, ridicule or humiliation, or repeated failure to treat a patient with dignity and respect; and

(d) Knowingly permitting another person to do any of the acts in pars. (a), (b) or (c) or knowingly failing to take reasonable steps to prevent another person from doing any of the acts in pars. (a), (b) or (c).

(3) EFFECT ON ELIGIBILITY. (a) If a claimant was discharged for conduct which the health care facility alleges was abuse of a patient and that conduct is determined not to be misconduct under this section, the claimant is eligible to receive benefits, if otherwise qualified.

(b) If a claimant was discharged for conduct which the health care facility alleges was abuse of a patient and that conduct is determined to be misconduct under this section, the claimant is not eligible to receive benefits based on credit weeks accrued with respect to that health care facility. The claimant is also ineligible to receive any benefits based upon employment with an employer other than the health care facility which discharged the claimant, for the week in which the discharge occurs and thereafter, until he or she has again worked within at least 7 weeks in employment covered by the unemployment compensation law of any state or the

federal government and has earned wages for work actually performed in employment covered by the unemployment compensation law of any state or the federal government equalling at least 14 times the employe's weekly benefit rate with the employer against whom benefits are initially chargeable. The employe's benefit rate shall be that which is otherwise applicable, as provided in s. 108.04(5), Stats. This paragraph applies if the employe's benefit year commences prior to April 2, 1989.

(c) If a claimant was discharged for conduct which the health care facility alleges was abuse of a patient and that conduct is determined to be misconduct under this section, the claimant is not eligible to receive benefits until 7 weeks have elapsed since the end of the week in which the discharge occurs and the employe earns wages after the week in which the discharge occurs equal to at least 14 times the employe's weekly benefit rate in employment or other work covered by the unemployment compensation law of any state or the federal government. For purposes of requalification, the employe's weekly benefit rate shall be that rate which would have been paid had the discharge not occurred. The wages paid to the employe by the health care facility shall be excluded from the employe's base period wages for purposes of benefit entitlement, as provided in s. 108.04(5), Stats. This paragraph applies if the employe's benefit year commences on or after April 2, 1989.

SECTION 4. EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.



State of Wisconsin \ Department of Industry, Labor and Human Relations

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Telephone 608/266-7552

November 22, 1988

Gary Poulson
Assistant Revisor of Statutes
Suite 904
30 West Mifflin Street
Madison, Wisconsin 53703

Douglas LaFollette
Secretary of State
Room 271, GEF-1
201 East Washington Avenue
Madison, Wisconsin 53702

Dear Messrs. Poulson and LaFollette:

TRANSMITTAL OF RULE ADOPTION

CLEARINGHOUSE RULE NO. 88-54

RULE NO. ILHR 132.001 and 132.05

RELATING TO Misconduct: abuse of a patient of a health care facility

Pursuant to section 227.20, Stats., agencies are required to file a certified copy of every rule adopted by the agency with the offices of the Secretary of State and the Revisor of Statutes.

At this time, the following material is being submitted to you:

1. Order of Adoption.
2. Rules Certificate Form.
3. Rules in Final Draft Form.

Pursuant to section 227.114, Stats., a summary of the final regulatory flexibility analysis is also included.

Respectfully submitted,

John T. Coughlin
Secretary