

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**CHERYL D GINES**  
Claimant

**APPEAL NO: 11A-UI-13241-D**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WESLEY RETIREMENT SERVICES INC**  
Employer

**OC: 09/18/11**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Cheryl D. Gines (claimant) appealed a representative's October 5, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Wesley Retirement Services, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 8, 2011. The claimant participated in the hearing. Debbie Hornbuckle appeared on the employer's behalf and presented testimony from two other witnesses, Heather Venz-Frank and Anna Head. During the hearing, Employer's Exhibit One was 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 November 15, 2010. She worked full time as a resident associate in the employer's assisted living center, primarily working overnight shifts from about 12:00 a.m. to 8:00 a.m. Her last day of work was the shift ending on the morning of September 17, 2010. The employer discharged her on September 19, 2010. The reason asserted for the discharge was sleeping on duty after prior discussions.

On May 18, 2011 the employer verbally counseled the claimant about an issue of sleeping on duty. On August 27 the program nurse, Head, personally saw the claimant sleeping and addressed the concern with her at that time. The claimant acknowledged that she had fallen asleep on that occasion and agreed that she would not do it again.

On the morning of September 17 another employee reported to the program director, Venz-Frank, that when she had come in for work at about 4:00 a.m. that she had seen four persons sleeping on couches in the living room/TV area, and that one of them was the claimant, and that another employee in the assisted living area might have been asleep in her chair in that office. The employer did not provide first-hand testimony from that witness, but rather only submitted a

written statement from that employee. The claimant acknowledged that she had been half-sitting/half-reclined on a couch, but denied that she was sleeping. She asserted that she had seen the other employee come in at 4:00 a.m. but simply had not gotten up when that employee passed through. She indicated that she had been periodically sitting in the living room area and getting up and performing duties throughout the night. She had not marked off any of the assigned cleaning duties on the check off sheet, but it was not uncommon for her not to mark off items on the list; the employer did not establish that she in fact did not complete the assigned duties for that shift.

Because the employer accepted as fact the assertion that the claimant had been sleeping while on duty on the morning of September 17 and because of the prior discussions with her regarding sleeping on duty, the employer discharged the claimant.

### **REASONING AND CONCLUSIONS OF LAW:**

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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the belief that she had been asleep on duty after prior warnings. The employer relies exclusively on the second-hand account from the other employee; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the employee might have been mistaken, whether she clearly observed the claimant specifically, or whether she is credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was in fact sleeping.

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 October 5, 2011 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 she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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