

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILDA J PHILLIPS
Claimant

APPEAL NO. 11A-UI-00699-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETHANY MANOR INC
Employer

OC: 12/12/10
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

An appeal was filed from an unemployment insurance decision dated December 12, 2010, reference 01, that concluded claimant was eligible for unemployment insurance benefits. A telephone hearing was scheduled for February 22, 2011. The employer, the appellant herein, did not respond to the notice of hearing. The claimant, Wilda Phillips, participated personally. Participating on behalf of the claimant was her attorney, Mr. Robert Huffer.

ISSUE:

At issue in this matter is whether the decision previously entered should be affirmed.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The appellant failed to provide a telephone number at which the employer could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

Having considered the evidence in the record, the administrative law judge finds: Wilda Phillips was employed by Bethany Manor Inc. for approximately sixteen and one-half years before being discharged on or about December 7, 2010. Ms. Phillips worked as a full-time certified nursing assistant and was paid by the hour. Her immediate supervisor was the charge nurse on duty.

Ms. Phillips was discharged by telephone when it was alleged that she had not provided sufficient patient care and had been observed “lying down” on a sofa during a break period.

Ms. Phillips had placed her feet up while sitting on a sofa during an authorized break period. The claimant had observed numerous other employees and management individuals at Bethany Manor utilize the sofa in the same manner and did not believe that her conduct would be contrary to any company policy or company interests. Ms. Phillips had not been warned or counseled about such conduct prior to being discharged.

Ms. Phillips had been providing care to a resident who had fallen out of bed at or near the time of the claimant's separation from employment. Ms. Phillips had provided care to the individual, regularly checking her, changing her bed clothes as needed and attaching a bed alarm to the resident as required. Ms. Phillips had reported to her supervisor on more than one occasion that the roommate of the resident in question had a proclivity for picking up items in the room, manipulating them and moving them about. Although Ms. Phillips had warned her supervisor about the conduct of the resident's roommate no action had been taken by the employer. Ms. Phillips denies any wrongdoing or malfeasance in the performance of her duties.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes that the employer has not sustained its burden of proof in establishing disqualifying misconduct sufficient to warrant the denial of unemployment insurance benefits.

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.

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The employer has the burden of proof in this matter. See Iowa Code section 96.6.2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment insurance 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).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in a disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Based upon the evidence in the record the administrative law judge concludes that the claimant was discharged for no disqualifying reason. The claimant performed her duties as required and alerted the employer to the possibility that a resident's roommate may have been manipulating items in the resident's room which may have included the resident's bed alarm. At the time of termination the employer cited the claimant's conduct in reclining on a sofa in a break period. The evidence establishes that employees and administrators routinely sat on the sofa, placing their feet up and that the claimant would have no reason to believe that such conduct was contrary to the employer's interests or would result in her termination from employment. Benefits are allowed providing that the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 12, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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