

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHEMIA C WISE
Claimant

APPEAL NO. 13A-UI-13106-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EVERGREEN REAL ESTATE
Employer

OC: 10/27/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated November 18, 2013, reference 01, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on December 16, 2013. Claimant participated. Participating as witnesses for the claimant were Ms. Angel Gary and Ms. Jolon Whitis. The employer participated by Ms. Angela Adams, Executive Director, and Mr. Craig Bell, Administrator.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Shemia Wise was employed by the captioned employer d/b/a The Rose of Waterloo from May 18, 2013 until October 28, 2013 when she was discharged from employment. Ms. Wise was employed as a part-time cook/dietary aide and was paid by the hour. Her immediate supervisor was Shari Huynh.

Ms. Wise was discharged on October 28, 2013 after she was unable to trade work days with her immediate supervisor on that date. Ms. Wise had previously requested to be off work on October 28, 2013 because of a pre-scheduled doctor's appointment for her daughter. When requested to trade days by her supervisor, the claimant declined for the above-stated reason and was told at that time, "You're fired." Subsequently, Ms. Wise was called to the employer's facility. The matter was reviewed and her discharge was verified.

Two days before on October 26, 2013, Ms. Wise had requested permission to leave work early in the event of her uncle's passing. (Her uncle was a resident at The Rose of Waterloo). The claimant had been given tacit permission by her supervisor to leave in the event of her uncle's death, "providing all her work was done." On October 26, 2013, the claimant left work at approximately one-half hour before the end of the shift when her uncle had passed. Ms. Wise attempted to contact her immediate supervisor to inform her that she was leaving at that time

but was unable to make a direct connection. Based upon the previous conversation, the claimant believed that she was authorized to leave. The claimant's supervisor did not indicate in any manner that the claimant's leaving was unacceptable until Ms. Wise reported to the facility on October 28 and at that time was told that her discharge was relating back to the incident that took place on October 26. The employer alleged that the claimant had acted inappropriately during a conversation on October 26 between herself and Ms. Huynh. During that meeting, the claimant believed that her supervisor was acting aggressively and attempted to avoid a dispute with her.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and

what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). In the case at hand the claimant was reasonable in her belief that she had authorization to leave work early on October 26, 2013. The claimant had completed her job duties and her supervisor had authorized her to leave if her uncle passed away that day. The claimant left approximately one-half hour early and heard nothing further about this matter until October 28, 2013 when the claimant was unwilling to trade work shifts with her immediate supervisor. The supervisor then alleged that the claimant had left work on October 26 without authorization and based upon the supervisor's statements, the employer elected to discharge Ms. Wise from her employment.

The administrative law judge concludes that the claimant did not engage in any act of misconduct sufficient to warrant the denial of unemployment insurance benefits on October 26, 2013. The claimant was called after that date by her supervisor and no mention was made about any issues with the claimant's conduct on October 26 until Ms. Wise stated that she was unable to trade shifts with her supervisor on October 28. The supervisor then alleged that the claimant had not acted appropriately two days before. Ms. Wise also denies any allegations of misconduct about a dispute between herself and her supervisor on October 26 and testified that the supervisor was the aggressor. The claimant did not respond to aggressive statements or demeanor of her supervisor that day.

In this matter the employer relies in large part, on hearsay testimony in support of their position. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony providing that the sworn, direct testimony is not inherently improbable and appears credible. The claimant testified with credibility and specificity denying the employer's allegations of misconduct.

For the reasons stated herein, the administrative law judge concludes that while the decision to terminate Ms. Wise from her employment may have been a sound decision from a management viewpoint, the evidence in the record does not establish misconduct sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated November 18, 2013, reference 01, is reversed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs