

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PATIENCE I UYANWUNE**  
Claimant

**APPEAL NO: 09A-UI-19564-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RESIDENTIAL ALTERNATIVES OF IOWA  
WINDMILL MANOR**  
Employer

**OC: 11/29/09  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 24.32(8) – Current Act

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated December 17, 2009, reference 01, that held the claimant was not discharged for misconduct on November 11, 2009, and benefits are allowed. A telephone hearing was held on February 9, 2010. The claimant participated. Stacy Willey, Assistant Administrator, participated for the employer.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began employment on September 22, 2009, as a full-time nursing assistant, and last worked for the employer on November 11. The claimant was discharged by the employer on November 12 for sleeping on the job.

The claimant received the policies of the employer in a handbook that provides an employee may be discharged for sleeping on the job. The claimant was issued a warning and three-day suspension for sleeping on the job on October 19. A nurse sent an e-mail to administration on November 5th that someone observed the claimant had been sleeping on the job. The nurse did not prepare a write-up for the claimant, as she did not observe the conduct.

The employer submitted a written notice to the claimant when she reported for work on November 12 she was being terminated for sleeping on the job. The claimant denied the conduct and she requested the presence of the person who accused her of this matter, but it was denied.

## REASONING AND CONCLUSIONS OF LAW:

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 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge concludes the employer has failed to establish that the claimant was discharged for a current act of misconduct in connection with employment on November 12, 2009.

The employer did not establish the date of the most recent incident (though it was reported on November 5th) or explain why the claimant was allowed to continue working after it. The nurse who reported the incident did not observe it and there is no statement from the observing party (source) to establish that it did occur. The nurse who reported the incident refrained from warning the claimant based on a lack of observation yet administration chose to discharge. The claimant denied this conduct, and there is not sufficient evidence to establish a recent incident of sleeping on the job that might be considered misconduct. The employer had the power to

offer such evidence, and its failure to do so may be inferred against it. Crosser v. IDPS, 240 N.W. 2d 682 (Iowa 1976).

**DECISION:**

The department decision dated December 17, 2009, reference 01 is affirmed. The claimant was not discharged for any current act of misconduct on November 12, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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