

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TINA M MARSHALL**  
Claimant

**APPEAL NO. 08A-UI-02137-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DIAL SILVERCREST CORP**  
Employer

**OC: 04/08/07 R: 03  
Claimant: Appellant (1)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The claimant, Tina Marshall, filed an appeal from a decision dated February 22, 2008, reference 04. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on March 18, 2008. The claimant participated on her own behalf and with a witness, Tammy Frees. The employer, Dial Silvercrest, participated by Executive Director Jim Hunter.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Tina Marshall was employed by Dial Silvercrest from April 26, 2006 until January 31, 2008, as a full-time medication manager. During the course of her employment, she received training on the handling of Alzheimer's patients and the polices regarding abuse of residents.

On January 31, 2008, Executive Director Jim Hunter entered the unit where the claimant was working shortly after 7:00 a.m. As he came in sight of Ms. Marshall, he saw her slap a resident across the face with the back of her hand. He immediately told her she was not to touch the residents, to which the claimant replied by asking if Mr. Hunter had seen what the resident had done to her. The employer responded it did not matter, that the residents were not to be touched. He then left and summoned the police to investigate the matter.

The police took statements from those who were present and the claimant acknowledged to them she had slapped the resident's hands. After they concluded their investigation, the claimant was discharged by Mr. Hunter and Vice President Donna Hawley for abuse of a resident. Ms. Marshall claimed at the hearing she did not strike the resident but merely turned her head away to avoid being spit on again. However, she never stated that to the employer at the time of discharge.

Ms. Marshall has been charged with simple assault but no trial date has been set as of the date of the hearing.

**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.

The claimant denies she did anything to the resident except to place her hands on the arms of her chair and turn her face away from her to keep her from spitting on her again. She maintains Mr. Hunter invented the entire incident but could give no reason why he might do so. Tammy Frees supported the claimant's version of the incident, but she is a personal friend of the claimant, both at work and outside of work.

The administrative law judge does not find the claimant or her witness to be credible. The claimant has every reason to deny being seen by the executive director abusing a resident, as that is a serious criminal matter, as well as subjecting her to being on the abuse registry and thus impacting her future employment prospects. Her witness, as a personal friend, would have an interest in supporting the claimant's version of the event for those same reasons.

The claimant has provided no explanation as to why the employer would invent this story simply to discharge her. She worked at the facility for two years with, apparently, no problems that would prompt the employer to want to fire her. It seems unlikely the employer would fabricate

such a story merely to find a reason to discharge Ms. Marshall, especially as he called the police to investigate and would have to testify to these facts in a criminal trial.

The administrative law judge finds it especially convincing that the claimant admitted, when she was told by Mr. Hunter not to touch the resident, that her response was to ask if he had seen what the resident did to her. She did not try to maintain at the time she had not struck the resident, or explain she was merely putting in the oxygen tube, or had simply turned the resident's head to one side to avoid being spit upon. Her initial response was apparently an attempt to justify striking the resident.

The record establishes the claimant was discharged for assaulting a resident. The employer's duty is to provide safety and care for the people in the facility, and Ms. Marshall's conduct jeopardized the health and safety of the resident. As well as being a criminal matter for herself, it exposed the employer to potential liabilities as well. This is conduct not in the best interests of the employer and the claimant is disqualified.

**DECISION:**

The representative's decision of February 22, 2008, reference 04, is affirmed. Tina Marshall is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount, provided she is otherwise eligible.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/kjw