

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AMBER F WRIGHT**

Claimant

**APPEAL NO. 09A-UI-11758-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**F H C OF STORM LAKE IA INC**

Employer

**OC: 07/12/09**

**Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the August 11, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 2, 2009. Claimant Amber Wright participated. Cindy Wiemold, Executive Director, represented the employer. The administrative law judge took official notice of the documents submitted for or generated in connection with the August 10, 2009 fact-finding interview. Exhibit One was received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Amber Wright was employed by Faith, Hope and Charity (F.H.C.) of Storm Lake, Iowa, Inc., as a full-time direct care worker from November 12, 2008 until June 30, 2009, when Cindy Wiemold, Executive Director, and On-call Supervisor Michelle Boyd discharged her from the employment.

The final incident that triggered the discharge occurred on June 20, 2009 and came to a supervisor's attention no later than June 22, 2009, when a coworker reported that Ms. Wright had fallen asleep on a bus. Ms. Wright was part of several employees who were transporting children with disabilities to and from the Omaha Zoo. Ms. Wright denies that she was sleeping on the bus. On June 22, 2009, a supervisor issued a written reprimand concerning the incident and warned that, "Written reprimand could lead to termination." The employer then did not bring up the matter again until June 30, 2009, when the employer notified Ms. Wright that she was discharged from the employment.

In making the decision to discharge Ms. Wright from the employment, the employer also considered Ms. Wright's attendance history. The most recent attendance matter had been Ms. Wright's tardiness on May 30, 2009. On May 30, the employer had suspended Ms. Wright in connection with that matter.

In making the decision to discharge Ms. Wright from the employment, the employer also considered an inappropriate remark another staff member alleged Ms. Wright had made about her sex life on June 24, 2009 in front of the children in the employer's care. A supervisor suspended Ms. Wright for three days based on the alleged utterance. The supervisor issued a written reprimand on June 26, 2009 and included in the reprimand a statement that continued disregard of agency policies may result in termination of employment.

## **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 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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment 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).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in 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).

The administrative law judge concludes that the employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct in connection with the employment. The employer witness lacked firsthand knowledge of the incidents that led to the discharge. The employer had the ability to present testimony from individuals with personal knowledge of those incidents and elected not to do that. The weight of the evidence indicates that Ms. Wright *may have* dozed off on June 20, 2009 while on a long bus trip from Storm Lake to Omaha. If Ms. Wright did in fact doze off on that day, the evidence fails to establish that the conduct was willful. In addition, the evidence indicates that - if this incident occurred as alleged - it would have been an isolated incident of sleeping behavior. The evidence indicates that the employer addressed the matter with Ms. Wright on June 22, 2009 by means of a written reprimand. The document itself indicates that a written reprimand could lead to termination. But a reasonable person reading that statement in the reprimand would conclude it was a statement about written reprimands generally, not a statement that the particular reprimand being issued on June 22 could lead to termination of employment. This interpretation is reinforced by the written reprimand that was issued on June 26, 2009, concerning the alleged inappropriate language. The June 26 reprimand makes reference to some *future* continued disregard of agency policy that may serve as the basis for terminating the employment. If Ms. Wright uttered the inappropriate sexual remark attributed to her, the evidence indicates poor judgment, rather than a willful disregard of the employer's interests. The bottom line is the employer did not present sufficiently direct evidence to prove that the alleged incidents that factored into the discharge actually occurred.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Wright was discharged for no disqualifying reason. Accordingly, Ms. Wright is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Wright.

**DECISION:**

The Agency representative's August 11, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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