

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BERNICE THOMPSON
Claimant

APPEAL NO. 09O-UI-10561-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MAINSTREAM LIVING INC
Employer

OC: 05/04/08
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Bernice Thompson filed an appeal from a representative's decision dated February 24, 2009, reference 04, that denied unemployment insurance benefits based upon her separation from Mainstream Living, Inc. An initial hearing was conducted on June 9, 2009 and the claimant's appeal was determined to be untimely. The matter was appealed to the Employment Appeal Board which reversed the decision on timeliness and remanded the matter back for hearing on the merits. After due notice a telephone conference hearing was scheduled for and held on August 10, 2009. Ms. Thompson participated personally. Participating on behalf of the claimant was Mr. James Hamilton, Paralegal. The employer participated by Ms. Marcanne Lynch, Human Resource Director. Employer's Exhibits One through Eleven were received into evidence.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: Bernice Thompson was employed by Mainstream Living, Inc. from October 7, 2008 until January 29, 2009 when she was discharged from employment. The claimant was employed as a full-time support living technician and was paid by the hour. Her immediate supervisor was Ms. Louann Wingfield.

The claimant was discharged when the employer believed that Ms. Thompson misreported her working hours for January 9, 2009. The claimant had reported that she had worked 10:00 a.m. until 6:00 p.m. that day. As a support living technician Ms. Thompson had flexible working hours and her hours were determined by the needs of the clients assigned to her.

It was reported in passing to a Mainstream Living employee that Ms. Thompson had attended a court hearing on January 9, 2009. The report was made by an individual employed by a

company where Ms. Thompson had previously been employed, and indicated she was at the hearing during time she reported as being at work. The claimant had appeared on behalf of a client in opposition to her previous employer at the court hearing. Ms. Thompson had responded to Mainstream's inquiries regarding her attendance at the court hearing when questioned. The claimant had indicated that she had attended the court hearing from 8:00 a.m. until approximately 9:05 a.m. and that her personal attendance at the court hearing did not conflict with her working hours or the hours that she had reported on her time card.

Based upon the employer's belief that Ms. Thompson had initially denied being at the court hearing to her immediate supervisor, and statements by individuals at the company where the claimant had previously been employed, and testified against, Mainstream concluded the claimant had falsified her time reporting. Ms. Thompson was therefore discharged.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that the claimant was discharged for misconduct sufficient to warrant a 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 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 is not necessarily 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, culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer fails to furnish available evidence to corroborate the allegations, 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 deficiency in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In the case at hand, the claimant appeared personally and testified under oath that she had attended a court hearing as a private individual unrelated to Mainstream Living on the morning of January 9, 2009. The claimant further testified that her court appearance took place between 8:00 a.m. and 9:05 a.m., a period of time that she had not claimed to be working for Mainstream Living, Inc. Although Ms. Thompson denied the allegation, her employer found more credible the statements made by Ms. Thompson's previous employer that she had attended the court hearing during time she reported as working on her time card. The employer also believed that Ms. Thompson had initially denied attending the court hearing based upon statements attributed to the claimant's supervisor at Mainstream.

The administrative law judge concludes based upon the evidence in the record that the employer has not sustained its burden of proof by establishing disqualifying misconduct. While hearsay evidence is admissible in administrative proceedings it cannot be accorded the same weight as sworn, direct testimony. The administrative law judge concludes that the claimant's sworn testimony with regard to the time that she attended the court hearing on January 9, 2009 must be given more weight than hearsay testimony that the claimant had attended the hearing during working hours or that the claimant had denied being at the hearing to her supervisor. The claimant's testimony is credible and not inherently improbable. Benefits are allowed, provided she meets all other requirements of Iowa Law.

DECISION:

The representative's decision dated February 24, 2009, reference 04, is reversed. The claimant was dismissed 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

pjs/pjs