

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANICE C RUTLEDGE
Claimant

APPEAL NO. 08A-UI-00069-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 12/02/07 R: 03
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Good Samaritan Society, Inc. (Good Samaritan), filed an appeal from a decision dated December 24, 2007, reference 01. The decision allowed benefits to the claimant, Janice Rutledge. After due notice was issued, a hearing was held by telephone conference call on January 17, 2008. The claimant participated on her own behalf and with a witness Shari Dakim. The employer participated by Director of Nursing (DON) Karen Kaiser. Exhibit A was admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Janice Rutledge was employed by Good Samaritan from September 23, 2003 until November 29, 2007, as a part-time licensed practical nurse. She had received a copy of the employee handbook, which provides for discharge of any employee who receives three written warnings in a 12-month period.

Ms. Rutledge received warnings on July 25, 2007, regarding attendance, and on September 26, 2007, for leaving a med cart unattended, unlocked, and with the keys on top. On November 17, 2007, DON Karen Kaiser received a report from a staff member the claimant had taken a can of pop belonging to a resident, without the resident's permission on November 25, 2007. The employer investigated by speaking with LPN Nicole Patchett, CNA Krissa Roberts, RN Robert Aszman and the resident herself. It was determined the pop had been taken without permission, contrary to policies and procedures.

Ms. Kaiser interviewed Ms. Rutledge on November 29, 2007, and the claimant stated she had permission from the resident and had replaced the can the next day. The employer had counted the number of cans with the resident's initials on them starting only on November 27, 28, and 29, 2007, and the number had remained consistent. Ms. Rutledge had replaced the

8-ounce can she had taken on November 25, 2007, with a 12-ounce can on November 26, 2007, putting it in the refrigerator with the other cans.

The matter was referred to the Iowa Department of Inspections and Appeals, which issued a finding that the report was unfounded, the resident having stated she gave the claimant permission to have one of her cans of pop.

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 to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). In the present case, the employer has failed to present any direct testimony to rebut the claimant's assertion she had permission to take the can and then replaced it the next day. The claimant had corroborating testimony about replacing the can of pop. The employees who did have firsthand knowledge of the alleged unauthorized taking of the pop did not testify. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which she was discharged.

Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The representative's decision of December 24, 2007, reference 01, is affirmed. Janice Rutledge is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw