

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRENDA A OMENDA**  
Claimant

**APPEAL NO. 16A-UI-06668-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**LUTHER CARE SERVICES**  
Employer

**OC: 05/15/16**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Luther Care Services (employer) appealed a representative's June 6, 2016 (reference 01) decision that concluded Brenda Omenda (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 1, 2016. The claimant participated personally. The employer participated by Todd Richardson, Hearings Representative; Kristen Anderson, Human Resources, and Jessica Iverson, Director of Nursing. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 13, 2016, as a full-time certified nursing assistant. The claimant signed for receipt of the employer's handbook on January 14, 2016.

On April 1, 2016, the employer issued the claimant a verbal warning. A resident the claimant was caring for would not allow her to provide care. The claimant reported the situation to the nurse and to the next shift. The employer thought the claimant should have had another co-worker try to care for the resident. On April 14, 2016, the employer issued the claimant a written warning. The employer reassigned the claimant to work in another area. The claimant politely told the employer she thought the reassignment was unfair. The employer thought the claimant was insubordinate. On April 28, 2016, the employer issued the claimant a written warning because a resident became tangled in a blanket. The claimant was watching two residents who kept trying to stand up. The claimant did her best to watch the resident's but the resident still became tangled in the blanket.

On May 5, 2016, the claimant was in a resident's room providing care to the resident. The nurse came in the room and told the claimant to get another resident out of the dining room. The claimant told the nurse that she could not leave her resident unattended. She had to care for her resident first. The claimant asked the nurse if she could help with the resident in the dining room. The nurse looked angry and left. A minute later a co-worker came into the room and told the claimant the resident was already out of the dining room. The nurse wrote up the information about the incident. On May 16, 2016, the employer terminated the claimant for being insubordinate on May 5, 2016.

The claimant filed for unemployment insurance benefits with an effective date of May 15, 2016. The employer participated personally at the fact-finding interview on June 3, 2016 by Connie Connolly.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(1)a and (8) 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

(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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on May 5, 2016. The claimant was not discharged until May 16, 2016.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). 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 employer had the power to present testimony but chose not to do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's June 6, 2016 (reference 01) decision is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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