

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICHOLE M WEAVER
Claimant

APPEAL NO. 13A-UI-04399-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

OC: 10/07/12
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, HCM, filed an appeal from a decision dated April 3, 2013, reference 03. The decision allowed benefits to the claimant, Nichole Weaver. After due notice was issued a hearing was held by telephone conference call on May 20, 2013. The claimant participated on her own behalf. The employer participated by DON Kim Bashor.

ISSUE:

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

FINDINGS OF FACT:

Nicole Weaver was employed by HCM from October 18, 2012 until April 11, 2013 as a full-time LPN/CNA. She was suspended on March 11, 2013, because two CNAs alleged she had slapped a resident. Ms. Weaver was interviewed before the suspension and she denied slapping the resident.

The resident is combative and not alert and oriented. He spit on Ms. Weaver and she knelt down, put her hand on his arm and told him spitting was not allowed. DON Kim Bashor examined the resident and could find no evidence of reddened skin or other signs of abuse. She then investigated the matter further by interviewing the two complainants and the decision was made to discharge. Ms. Weaver was fired on April 11, 2013.

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 presented only second-hand hearsay evidence about the incident. Neither of the two CNAs who made the complaint testified about their first-hand observations.

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 April 3, 2013, reference 03, is affirmed. Nicole Weaver is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs