

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CYNTHIA L REED**

Claimant

**APPEAL NO. 11A-UI-00702-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARMELITE SISTERS FOR THE AGED**

Employer

**OC: 12/19/10**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated January 13, 2011, reference 01, which denied benefits based upon the claimant's separation from employment. After due notice, a telephone hearing was held on February 23, 2011. The claimant participated personally. The employer participated by Cherie Brauer-Neuhalfen, Laura Williams and Heather Warren.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having considered the evidence in the record, finds: Cynthia Reed was employed by the Carmelite Sisters for the Aged as a full-time certified nursing assistant from June 22, 2009 until December 15, 2010 when she was discharged from employment. Ms. Reed was paid by the hour. Her immediate supervisor was Cherie Jepsen.

Cynthia Reed was discharged on December 15, 2010 when it was reported to the facility management that Ms. Reed had not followed the instructions of two nurses to place a resident in bed. It was reported that instructions had been given to Ms. Reed on more than one occasion but that the claimant had not complied.

When Ms. Reed began her 10:00 p.m. shift that evening, a wheelchair-bound resident had not been placed in bed the previous shift. Ms. Reed attempted on a number of occasions to assist the resident or to cajole her into going to bed, however, the resident was unwilling. When one nurse inquired why the resident was not in her usual "recliner" rather than in the hall, Ms. Reed responded that the recliner was broken. No other mention was made about the issue to Ms. Reed until later in the shift. During this time Ms. Reed was working on a number of other patients and was required to rotate them on a regular basis. Ms. Reed believed that the resident's sitting position was sufficient for the resident and regularly checked the resident as

the claimant passed by. Later in the shift the claimant was reminded to attempt to lay the resident down and was able to do so with the assistance of another aide. Ms. Reed did not bring the matter of the resident remaining in the hall to the attention of the nurses as she reasonably believed that they had observed the resident on numerous occasions as they passed by performing their duties.

It is the claimant's position that one of the nursing staff later complained about the care that the claimant provided to the resident in question because the nurse was upset as another resident had been hospitalized who was under the claimant's care.

Generalized warnings had been given to all staff about performing their duties. Ms. Reed had been warned in the past about the demeanor that she displayed in working with other staff members.

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

The question before the administrative law judge is whether the evidence is sufficient in the record to disqualify the claimant from receiving unemployment insurance benefits. It is 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 may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct a discharge for misconduct cannot be based upon past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

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

In this matter the claimant appeared personally and provided sworn testimony. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable. In contrast the evidence in support of the employer is hearsay in nature. Although hearsay is admissible in administrative proceeds it cannot be accorded the same weight as sworn direct testimony.

Ms. Reid testified that she was not repeatedly instructed to place the resident in question in bed during the night of December 15, 2010. Ms. Reid testified that the nursing staff was aware that the resident was sitting in a hallway and were aware that the resident had been left as she was not tired and did not want to go to bed. Because the resident was rocking and rotating herself, Ms. Reid believed that she was receiving sufficient stimulation and did not need to be repositioned. The claimant did not explain to the nurses that the resident was refusing to go to bed because she had not been instructed by the nurses on the night in question to place the resident in bed. The claimant testified that the matter did not become an issue until a nurse became upset when another resident was sent to a hospital and believed that Ms. Reid had played some part in the decision to send that resident "out."

The question before the administrative law judge is not whether this employer had a right to discharge this claimant but whether the evidence in the record is sufficient to establish disqualifying misconduct. While the decision to terminate Ms. Reid may have been a sound decision from a management viewpoint, for the above-stated reasons the administrative law judge concludes that the employer has not sustained its burden of proof in establishing job-related misconduct. Benefits are allowed providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated January 13, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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