

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AUBREYA S ALLEN**

Claimant

**APPEAL NO. 16A-UI-08369-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR QUALITY CARE INC**

Employer

**OC: 07/03/16**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Five Star Quality Care (employer) appealed a representative's July 26, 2016, decision (reference 01) that concluded Aubreya Allen (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 August 18, 2016. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Gary Barrett, Human Resources Manager. Exhibit D-1 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 May 7, 2015, as a full-time certified nurse aide. At the end she worked Monday through Friday as a shower aide. She did not usually work holidays. The claimant signed for receipt of the employer's handbook on May 7, 2015. On March 18, 2016, the employer issued the claimant a written warning for attendance. All of the absences were due to illness and properly reported. On April 6, 2016, the employer issued the claimant a written warning for not getting all her work done. The employer never notified the claimant she could be terminated if she did not improve her behavior.

The employer told the claimant to work on July 4, 2016, as a shower aide. After the claimant worked a few hours, the charge nurse told the claimant she could leave early. On July 5, 2016, the claimant returned to work and the employer placed her on suspension pending investigation for leaving early. On July 7, 2016, the employer terminated the claimant for leaving early.

The claimant filed for unemployment insurance benefits with an effective date of July 3, 2016. The employer did not participate in the fact-finding interview on July 25, 2016.

## 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 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).

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 statements do not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. 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 July 26, 2016, decision (reference 01) 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

bas/pjs