

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA M TAPPER
Claimant

APPEAL NO. 11A-UI-01945-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BETHANY MANOR
BETHANY MANOR INC DBA BETHANY LI
Employer

OC: 1/21/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated February 10, 2011, reference 02, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on March 16, 2011. Claimant participated personally. The employer participated by Rhonda Herschberger, Lead Human Resource Generalist.

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: Lisa Tapper was employed by Bethany Manor from March 29, 2007 until November 23, 2010 when she was discharged from employment. Ms. Tapper worked as a full-time LPN and was paid by the hour. Her immediate supervisor was Ms. Terri Matheason.

The claimant was discharged on November 23, 2010 after a certified nursing assistant reported to the director of nursing that Ms. Tapper had been "sleeping on the job." Because the claimant had previously been warned for sleeping on the job in August of 2010, the employer believed the report to be credible and discharged Ms. Tapper.

The claimant denies sleeping on the job and believes that her discharge was caused by an inaccurate report given by the certified nursing assistant.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of 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.

In this case the claimant participated personally and provided sworn first-hand testimony denying the allegation that she had been sleeping on the job. Ms. Tapper denied sitting in a recliner chair in a common area and specifically denies sleeping on the job after being warned by the company on August 4, 2010. In contrast the evidence in support of the employer is hearsay. Although hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony. The administrative law judge finds the claimant to be a credible witness and finds that her testimony is not inherently improbable.

The employer has the burden of proof in this matter. See Iowa Code section 96.6.2. 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 such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct 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).

Upon application of the facts to the law the administrative law judge concludes that the evidence in the record is not sufficient to establish disqualifying misconduct. Benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated February 10, 2011, reference 02, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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