

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARTIKA FOUNTAIN
Claimant

APPEAL NO. 14A-UI-01658-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

LUTHER CARE SERVICES/HOMES FOR
Employer

OC: 01/12/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated February 3, 2014, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on March 6, 2014, by telephone conference call. The claimant participated personally. Employer participated by Keri OwenBahr, director of dietary; Janet Harges, assistant director of dietary; and Carl Koedam, administrator. The record consists of the testimony of Keri OwenBahr; the testimony of Martika Fountain; and Employer's Exhibits 1-3.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a long term care facility located in Des Moines, Iowa. The claimant was hired on December 1, 2009, as a full-time dietary aide. The claimant's last day of work was January 14, 2014. She was terminated on January 14, 2014.

The claimant was terminated because the employer believed that she had been insubordinate to the former administrator. The former administrator did not testify at the hearing. There was a spill in the kitchen and the parties dispute whether the claimant was asked to mop up the spill and refused. The claimant was not asked to mop up the spill but would have done so if asked to do so.

The claimant had been given two prior warnings for insubordination on May 25, 2012, and May 26, 2012. The claimant knew her job was in jeopardy and that she would be terminated if she had another incident of insubordination.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. The claimant credibly testified that she did not refuse to mop up a spill in the kitchen when requested to do so by the former administrator. The claimant said that she was never asked to mop up the spill. The administrator took it upon herself to do the job. The former administrator did not testify at the hearing. The employer had no witnesses that directly heard or observed what happened in the kitchen on January 14, 2014. The employer's evidence, therefore, is hearsay in nature.

Although hearsay is admissible in administrative hearings, it has limited value in proving misconduct. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct without additional evidence shall not be sufficient to result in 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).

Because the former administrator did not testify, the administrative law judge was unable to weigh the credibility of the claimant's sworn testimony. The administrative law judge concludes that there is insufficient evidence in this record to show misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated February 3, 2014, reference 01, is affirmed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs