

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CONNIE F HENRICKS
Claimant

APPEAL NO. 10A-UI-08713-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALLEN MEMORIAL HOSPITAL
Employer

OC: 05/23/10
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated June 16, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 4, 2010. The claimant participated. The employer participated by Nicole Larson, human resources manager. The record consists of the testimony of Nicole Larson; the testimony of Connie Henricks; and Employer's Exhibits 1 through 5.

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 in this case provides hospital and long-term care for dependent individuals. The claimant worked as a certified nursing assistant at the Grundy County Memorial Hospital in Grundy Center, Iowa. The claimant had worked for the employer since July 23, 1997. She was terminated on May 25, 2010, for sleeping while on duty.

The incident that led to the claimant's termination occurred on the shift that began at 6:00 p.m. on May 23, 2010 and continued until 6:30 a.m. on May 24, 2010. One of the claimant's co-workers, Laura Young, reported that the claimant was sleeping on the job and had not been performing her duties. Upon receiving this report, the employer conducted an investigation, which included an interview of the claimant on two occasions. The decision was made to terminate the claimant and she was informed of her termination on May 25, 2010. The claimant denied that she was sleeping on the job.

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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Sleeping on the job, in violation of a known work rule, could be misconduct. The employer has the burden of proof to show misconduct.

The claimant denied that she was sleeping on the job on May 23, 2010. The employer's witness, Nicole Larson, does not have firsthand knowledge of the events of that night. The employer's evidence is the statement of Laura Young, who witnessed the claimant sleeping and who reported the incident to the employer. Ms. Young did not testify at the hearing. The administrative law judge had no opportunity to weigh the credibility of her testimony with that of the claimant.

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).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

The evidence presented by the employer in this case consisted of hearsay from a co-employee that the claimant was sleeping on the job. The individual who reported the information did not participate in the hearing. There is no indication as to why they could not have participated in the hearing. The administrative law judge had no opportunity to evaluate the credibility of the testimony. Accordingly, there is no credible evidence on which to base a finding of misconduct. Benefits will be allowed, if the claimant is otherwise eligible.

DECISION:

The representative's decision dated June 16, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw