**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**LORI J SCHNECKLOTH**
Claimant

**COLONIAL MANOR OF MANILLA INC**
Employer

**APPEAL NO. 09A-UI-14460-VST**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 08/30/09**
**Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated September 17, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 27, 2009. Claimant participated. Employer participated by Linda Sauvago, office manager. The record consists of the testimony of Linda Sauvago and the testimony of Lori Schneckloth.

**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 is a skilled nursing home facility. The claimant was employed as a charge nurse. She generally worked a shift from 3:00 p.m. to 11:00 p.m. She was a licensed practical nurse and a full-time employee. Her last day of work was July 12, 2009, and she was terminated on July 14, 2009.

The incident that led to the claimant's termination occurred on July 6, 2009. The claimant was suffering from a migraine headache. She took some Tylenol and then asked the registered nurse who was also on duty whether she could lie down for a while in an effort to control the pain. He informed her that this was fine. A few days after this incident, management became aware of the incident and did an investigation. The employer concluded that the claimant was sleeping on the job. The employee handbook states that sleeping on the job is a group III violation. If there is a group III violation, immediate termination results.

**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 duty owed by the worker to the employer. The employer has the burden of proof to show misconduct.

In this case, the claimant was terminated for sleeping on the job. She credibly testified that she had a migraine headache and had asked for permission to lie down to help ease the pain. It is entirely possible that she did fall asleep or was perceived to be sleeping. She denied having slept on the job. The individual who actually observed the claimant on that day did not testify at the hearing. The employer read a statement into the record concerning his observations. The employer also read into the record a statement from another employee who allegedly heard the claimant bragging about having slept during her shift. That individual also did not testify.
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 section 17A.14(1). The hearsay evidence concerning what the claimant did on July 6, 2009, and what she later said is imprecise and conclusory. Because of the nature of the evidence produced at hearing, the employer is unable to show misconduct.

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 requires 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 reports that the claimant was sleeping on the job and later bragged about it. The individuals 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. Ms. Sauvago had no first-hand knowledge about any of these events and did not even participate in the decision to terminate the claimant. 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 decision of the representative dated September 17, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs