

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DONNA E WHITFIELD
Claimant

APPEAL NO. 10A-UI-03853-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FIVE STAR QUALITY CARE INC
Employer

**Original Claim: 01/24/10
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Five Star Quality Care, Inc., doing business as Union Park Health Services, filed an appeal from a representative's decision dated March 5, 2010, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice was issued, a telephone conference hearing was held on April 27, 2010. The claimant participated personally. The employer participated by Ms. Nancy Dzinic, director of nursing.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Donna Whitfield was employed by Union Park Health Services from April 29, 2008, until January 21, 2010, when she was discharged from employment. Ms. Whitfield worked as a certified nursing assistant and was paid by the hour. Her immediate supervisor was Nancy Dzinic, director of nursing.

On January 15, 2010, a laundry worker alleged that she had observed Ms. Whitfield treating a resident inappropriately by calling him a racial slur and roughly transferring the resident to a chair. When questioned, Ms. Whitfield categorically denied the allegation and stated her belief that the allegation was contrived by the laundry worker because Ms. Whitfield had rejected the laundry worker's inappropriate advances that were of a sexual nature.

The matter was reported to the State and was investigated. The investigators found the allegations to be undeterminable. A decision was nevertheless made to terminate Ms. Whitfield. Some individuals who were questioned during the employer's investigation stated that, at times, the claimant was "short" with residents. A resident stated the claimant was "rough."

Although the claimant had never been warned or counseled about the manner that she provided care, a decision was made to terminate Ms. Whitfield from her employment to minimize any possibility of unacceptable treatment of residents.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged for no disqualifying reason.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unable 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 produce, it may fairly be inferred that the more direct evidence will expose deficiencies in that parties case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this case, the employer made a management decision to terminate Ms. Whitfield based upon the statements of a disgruntled employee whose advances had been rejected by the claimant. The employer also relied upon generalized statements from various employees and a resident who indicated the claimant, at times, could be "short" with residents. The individuals making the statements cited no specific incidents, and the claimant had not been formally warned or counseled by staff members who had made the generalized negative statements about the claimant. The administrative law judge, having reviewed the evidence in the record, finds the claimant to be a credible witness and finds that her testimony is not inherently improbable. Ms. Whitfield at all times categorically denied treating a resident inappropriately in any manner and explained that her general demeanor and her rapid manner of talking sometimes causes individuals to misunderstand her intentions. The hearsay testimony provide by the employer regarding Ms. Whitfield's conduct cannot be accorded the same weight as Ms. Whitfield's sworn firsthand testimony in this matter. The administrative law judge concludes, therefore, that the employer has not sustained its burden of proof in establishing that the claimant's discharge took place under disqualifying conditions.

While the decision to terminate Ms. Whitfield may have been a sound decision from a management viewpoint, the evidence is not sufficient to warrant the denial of unemployment insurance benefits.

DECISION:

The representative's decision dated March 5, 2010, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

tpn/kjw