IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOLYNN M NIELSEN
Claimant

ALS CORNER OIL CO
Employer

APPEAL NO. 10A-UI-12843-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/08/10
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Al's Corner Oil, filed an appeal from a decision dated September 8, 2010, reference 02. The decision allowed benefits to the claimant, Jolynn Nielsen. After due notice was issued a hearing was held by telephone conference call on November 1, 2010. The claimant participated on her own behalf. The employer participated by Office Manager Cindy Tiefenthaler, Supervisor Deb Ludwig and Manager Christy Zulan.

ISSUE:

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

FINDINGS OF FACT:

Jolynn Nielsen was employed by Al's Corner Oil from January 11 until August 18, 2010, as a part-time clerk. The employer did not think the claimant was working her scheduled shifts as expected but no one ever issued any formal, or apparently any informal, disciplinary action to her. It was only on August 7, 2010, that she called in absent due to illness that the employer said she must bring in a doctor's note, which she did.

On August 18, 2010, the claimant was not scheduled to work but another employee called in absent and Manager Christy Zulan texted Ms. Nielsen to ask if she could work 2:00 p.m. until 10:00 p.m. A number of texts passed between the two of them and it was apparently expected the claimant would work 5:00 p.m. to 7:00 p.m. Around 4:30 p.m. Ms. Nielsen decided she would not be back in town until after 6:00 p.m. but did not notify Ms. Zulan of that until shortly before that time, not before 5:00 p.m. when she was expected to be at work. Then she decided it was not worth the time to work less than an hour and did not come in at all.

Ms. Zulan consulted with Supervisor Deb Ludwig and the decision was made to discharge the claimant. Ms. Zulan notified Ms. Nielsen of the discharge by text later that day.

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The employer may have been dissatisfied with the claimant's attendance but never issued any kind of warning or disciplinary action to her about this problem. The only documented incident was when she was told to provide a doctor's excuse and she did so.

Both the claimant and the employer elected to use texting as a method of communicating about the request for Ms. Nielsen to work someone else's shift on August 18, 2010, and much seems to have been left out of the process of communication as a result. While the claimant showed a certain disregard in not notifying the employer more promptly she would not be able to come in after all, she had no reason to believe her job was in jeopardy as a result. Without warnings or disciplinary notice the claimant had every reasonable expectation that this was a single incident of failing to come to work and as such was no excessive, unexcused absenteeism.

The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262(Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment benefits are two separate decisions. *Pierce v. IDJS*, 426 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to

warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. IDJS*, 351 N.W.2d 806 (Iowa App. 1984).

DECISION:

The representative's decision of September 8, 2010, reference 02, is affirmed. Jolynn Nielsen is qualified for benefits, provided she is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/css