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

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

**KELSEY J REIMERS**
Claimant

**MCCALL COMPANY INC**
Employer

**APPEAL NO. 11A-UI-15768-S2**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 11/6/11**
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

McCall Company (employer) appealed a representative's December 6, 2011 decision (reference 01) that concluded Kelsey Reimers (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was scheduled for February 8, 2012, in Des Moines, Iowa. The claimant participated personally. The employer participated by Greg McCall, President, and Julie Host, Office Manager. The claimant offered and Exhibit A, B, and C were received into evidence. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 28, 2011, as a part-time cleaner. She suffered a work-related injury on July 11, 2011. The claimant sought medical treatment and on January 11, 2012, the claimant was released to return to work without restrictions. She returned to the employer stating she could work but was a bit sore. The employer refused to return the claimant to work and sent her to a chiropractor that the employer thought was good. The employer told the claimant that it felt uncomfortable returning the claimant to work and would help her to find a new job.

The claimant followed the chiropractor's instructions for four weeks. On July 22, 2011, the claimant notified her supervisor that the chiropractor thought she might need to be referred to an orthopedic surgeon. The supervisor replied that he was going to call the chiropractor. He added "you realize fraud is a federal offense." The claimant was upset by the comment and sought legal advice.

At the end of July 2011, the employer asked the claimant to pick up and complete forms for the employer's workers' compensation carrier. The claimant took the forms to her attorney,

completed the forms and mailed them to the employer's workers' compensation carrier. At the same time the employer completed the forms and submitted them to the carrier.

Shortly thereafter the carrier referred the claimant to DoctorsNow. The claimant's physician released her to return to work with restrictions on October 12, 2011. The employer did not have work that would meet the claimant's restrictions. On November 2 and 3, 2011, the physician released the claimant to return to work without restrictions. The employer received the doctor's notes but did not ask the claimant to return to work. The claimant filed for unemployment insurance benefits with an effective date of November 6, 2011. On December 2, 2011, the employer called the claimant's attorney and left a message indicating the claimant was welcome to come for a job.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service,

351 N.W.2d 806 (Iowa App. 1984). In July 2011, the employer told the claimant it would rather she did not work for them again. The claimant had doctor's releases to return to work in July, October and November 2011. The employer did not return the claimant to work. The employer separated the claimant from employment. It did not offer sufficient evidence of job-related misconduct for not returning the claimant to work when she was able. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's December 6, 2011 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

_____
Beth A. Scheetz
Administrative Law Judge

_____
Decision Dated and Mailed

bas/css