

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANNMARIE BANDIERO**

Claimant

**APPEAL NO. 14A-UI-06123-S2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALS CORNER OIL COMPANY**

Employer

**OC: 05/18/14**

**Claimant: Appellant (2/R)**

Section 96.5-1 – Voluntary Quit  
Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Annmari Bandiero (claimant) appealed a representative's June 9, 2014 (reference 01) decision that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Al's Corner Oil Company (employer). After hearing notices were mailed to the parties' last-known address of record, a telephone hearing was scheduled for July 8, 2014. The claimant participated personally. The employer participated by Bonnie Jeffrey, Manager, and Danee Snyder, Auditor. The claimant offered and Exhibit A 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 February 15, 2014 as a full-time clerk. The claimant signed for receipt of the employer's handbook on February 15, 2014. The handbook states an employee must notify their store manager by making direct contact by phone when the employee is absent from work.

On May 7, 2014 the claimant sent the employer a text message saying she could not work because her father was hospitalized after having a heart attack and she had to be with him. The manager did not respond to the claimant but told coworker John Carmichael to fill in for her.

On May 9 and 10, 2014 the claimant notified the employee at the store, John Carmichael, she would not be able to work because she was with her ailing father. John Carmichael said he would text the manager because the manager would respond to his texts and not the claimant's. On May 10, 2014 the claimant stopped by the store and talked to John Carmichael and another coworker. The two indicated the claimant had been terminated.

On May 12, 2014 the manager wrote out two employee deficiency reviews and put them in the claimant's file. One review was for a "no-call/no-show" on May 9, 2014. The other was for one on May 10, 2014. Each stated, "If we have any future problems with your shift or job performance you will be terminated without notice."

Also on May 12, 2014 the claimant sent the manager a text message requesting a leave of absence because her father was ill. The manager did not respond to the claimant. The employer was unaware of the text messages to the manager and assumed the claimant quit work on May 7, 2014 when she did not appear for her shift.

The claimant was unable to work from May 7 through June 9, 2014, because she was with her father.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention of quitting. She reported her absences to the manager by phone. When the manager would not respond to her she reported her absences through a coworker. This separation was not voluntary.

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

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). As of May 12, 2014 the manager indicated the claimant would be terminated for further infractions. The manager did not respond to the claimant's request for a leave of absence. The employer has not provided a final incident after May 12, 2014. The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer was not able to provide any evidence of a final incident of misconduct. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The issue of whether the claimant was able and available for work is remanded for determination.

**DECISION:**

The representative's June 9, 2014 (reference 01) decision is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed. The issue of whether the claimant was able and available for work is remanded for determination.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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