

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER L HELMICH-MANN
Claimant

APPEAL NO: 13A-UI-11106-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SERVPRO OF ESTERVILLE
Employer

OC: 09/01/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jennifer L. Helmich-Mann (claimant) appealed a representative's September 24, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with ServPro of Estherville (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 23, 2013. This appeal was consolidated for hearing with one related appeal, 13A-UI-11107-DT. The claimant participated in the hearing. Randy Colstrud appeared on the employer's behalf and presented testimony from one other witness, Susie Bradley. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on October 3, 2008. She worked full time as a crew person. Her normal or base schedule was to work from 8:00 a.m. to 5:00 p.m., Monday through Friday, but she could be required to work additional time as necessary. Her last day of work was August 30, 2013. The employer discharged her on September 3, 2013. The reason asserted for the discharge was refusing to go to a work site and picking and choosing her own hours.

On Friday, August 30 the claimant had worked on two jobs in the morning. At about 8:30 a.m. she received a call from her 11-year-old daughter's school indicating that the daughter needed to be picked up because she had just started her first menses. The claimant could not leave at that time, but arranged for her mother to pick up her daughter. However, she sent a message to

the office indicating that she needed to leave at noon; she felt she needed to do so because her daughter was upset and wanted her mother.

At about 12:30 p.m. the claimant came into the office, intending on then leaving for the day. Bradley, the office manager, told the claimant that she was needed to go to Sibley, about a 45-minute drive away, to inspect a new claim. The claimant declined, indicating that she needed to go home, and she left.

On Saturday, August 31, Colsrud, the owner/manager of the business, had discussions with the claimant about what had happened Friday, as he was unhappy with her choice. When she came in for work on September 3, he discharged her.

He asserted that he had previously spoken to her about her attendance, noting that she had missed 26 days of work in 2013, and had missed comparable amounts in prior years. However, he had never given her a written warning; the claimant did not realize that her job was in jeopardy if she missed any more time away from work. Colsrud noted that the claimant had indicated on August 12 that as of August 26 she would not be available to work past 5:00 p.m. for a two-month period because she was coaching her daughter's soccer team; while he was not happy about this, he had made arrangements for someone else to cover any time after 5:00 p.m. Further, he noted that the claimant had excessive text messaging on the employer's cell phone in the month of August. The claimant had routinely used the cell phone for personal texting in the past with the employer's knowledge, and made a monetary contribution to the employer during periods of high usage, without any disciplinary action or negative response from the employer. The employer asserted that the texting in August had interfered with the claimant's work productivity; the claimant denied that it had any notable effect on the productivity.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The gravity of the incident and the number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current or formal warning may detract from a finding of an intentional policy violation.

The reason cited by the employer for discharging the claimant is her declining to go to the additional work site on August 30, 2013, after the employer had endured the other frustrations regarding the claimant's work schedule and usage of the cell phone. Misconduct connotes volition. *Huntoon*, supra. The claimant had not previously been warned that her job was in jeopardy and that future time away from work or other issues could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). While declining to perform a particular job function can be misconduct, the question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa App. 1985); *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768 (Iowa App. 1982). The claimant's reason for leaving early on August 30 was not unreasonable. Under the circumstances of this case, the claimant's leaving work was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. While the employer might have had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 24, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css