IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEBRA D HARRIS
Claimant

COMES ENTERPRISES LLC
Employer

APPEAL NO. 10A-UI-12732-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/21/08
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Comes Enterprises, filed an appeal from a decision dated September 3, 2010, reference 05. The decision allowed benefits to the claimant, Debra Harris. After due notice was issued a hearing was held by telephone conference call on October 28, 2010. The claimant participated on her own behalf, with witness Lance Harding and was represented by Thomas Frerichs. The employer participated by General Manager Brian Oetker and Director of Operations Ed McGowan. Exhibit One was admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Debra Harris was employed by Comes Enterprises from August 17, 2009 until June 1, 2010 as a full-time crew member. She had received a written warning for being no-call/no-show to work on May 9, 2010, because she assumed that she would not have to work Mother's Day even though she was on the schedule and had not requested that day off.

On May 28, 2010, the claimant came to General Manager Brian Oetker with the intention of working her shift but said her adult son had had an accident which broke his leg and he needed someone to care for him. The general manager agreed to let her have that day off but advised her that she was still scheduled for work May 30 and June 1, 2010, and needed to keep in touch with him about whether she would be working. Ms. Harris assumed she had blanket permission to be off work until her son's leg would be put in a cast on June 2, 2010.

When Ms. Harris was no-call/no-show to work on May 30 and June 1, 2010, her name was taken off the schedule. A co-worker contacted the claimant and told her of this and she then called Mr. Oetker who notified her she was fired for being no-call/no-show for two shifts.

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.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant was aware of her scheduled shifts but was no-call/no-show for two of them. She maintains she believed she had permission to be off work until June 2, 2010, when her son's leg would be put in a cast. But it is noted she has had at least one prior incident of making an unwarranted assumption she was entitled to take time off from work that she had not requested and for which she had not been granted approval.

The employer merely wanted the claimant to keep in touch with him about whether she would be working May 30 and June 1, 2010, and was willing to work with her as he had on a previous occasion. The administrative law judge does not find the claimant to be any more or less credible than the employer. But the employer has the burden of proof to establish willful misconduct by a preponderance of the evidence and the record does not firmly establish the claimant did not know she had not been granted approval for time off through June 2, 2010.

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 3, 2010, reference 05, is affirmed. Debra Harris 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/pjs