IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TERI L OWENS
Claimant

NORTH LIBERTY PAINTERS
Employer

APPEAL NO. 10A-UI-11620-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07-18-10
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 10, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 4, 2010. The claimant did participate along with her witness, Nicole Poldberg, and was represented by David E. Brown, attorney at law. The employer did participate through Stacey Wisnousky, vice president; Katherine Wisnousky; Brad Stanley, supervisor; Mathew Ritchart, former painter. Claimant's Exhibit A was entered and received into the record. Employer's Exhibit One was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a supervisor in charge of team painters, full-time, beginning in October 2008 through July 15, 2010, when she was discharged.

On July 9 after work, the claimant was at a bar getting intoxicated. She sent text messages to Nicole Poldberg, an employee she supervised, asking her to contact Stephanie, another employee she supervised, to see if she would have sex with her. The claimant told Ms. Poldberg that if she could not "have her," she wanted to have sex with Stephanie. The claimant asked Ms. Poldberg to tell Stephanie that she "would bang her out better than any man ever has." (see Employer's Exhibit One). The claimant sent two texts to Stephanie, one of which said, "I need you." Stephanie never responded to the claimant's texts and told Ms. Poldberg to tell the claimant she had other plans. On Saturday morning July 10, the claimant sent both Ms. Poldberg and Stephanie a text message apologizing for her behavior the previous evening.

The employer learned of the text message and spoke to the claimant about them on July 15 while Brad Stanley was present. Ms Wisnousky told the claimant that the text messages were inappropriate and that she should not be sending sexually explicit text messages to any

employees, particularly ones she supervised. Ms. Wisnousky did not tell the claimant she could not socialize with coworkers, only that her behavior toward them had to be free of sexually explicit text messages. After Ms. Wisnousky warned the claimant, the claimant told Ms. Wisnousky that she was going out again that weekend, so Ms. Wisnousky better get her written warnings ready. Ms. Wisnousky believed the claimant was indicating that she was not going to follow the instruction that she not send her subordinates sexually explicit text messages. The employer provided the claimant with sexual harassment training.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. EAB*, 531 N.W.2d 645 (Iowa App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). 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 the circumstances and the employee's reason for noncompliance. Endicott v. IDJS, 367 N.W.2d 300 (Iowa App. 1985).

It was not unreasonable for the employer to require that, even while off work, the claimant refrain from sending sexually explicit text messages to the employees she supervised. The claimant's being drunk while having done so is not an excuse, and the fact that the employees may not have been offended is similarly not an excuse. By telling the employer to get ready to write her up again, the claimant was clearly indicating to the employer that she would again be texting employees. Such behavior is insubordination and is not reasonable under the circumstances. The employer is allowed to expect all employees to be honest in their dealings with her, including in providing information to her. The employer was not obligated to overlook a clear violation of the sexual harassment policy just because some of her employees did not want to get another employee in trouble.

While Ms. Wisnousky intended only to demote the claimant, the claimant's indication to her during the disciplinary meeting that she was going to go out again so Ms. Wisnousky should get her write ups ready is a clear indication that the claimant was not going to follow the employer's reasonable instructions. Such an action in light of the past text messages, which were sexually explicit and clearly inappropriate, is sufficient misconduct to disqualify the claimant from receipt of unemployment insurance benefits. Benefits are denied.

DECISION:

The August 10, 2010 (reference 01) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw