

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NANCY C COLLINS
Claimant

APPEAL NO. 11A-UI-05629-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ALS CORNER OIL CO
Employer

**OC: 03/27/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 20, 2011, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 20, 2011. Claimant participated. Employer participated by Chris Drake, supervisor, and Cindy Teffentaler, operations director. The record consists of the testimony of Cindy Teffentaler; the testimony of Chris Drake; and the testimony of Nancy Collins.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer operates convenience stores. The claimant was employed as the manager at the stores located in Stanhope, Iowa. The claimant was initially hired on September 29, 2008, as a clerk. Her last day of work was March 29, 2011. She was suspended on March 29, 2011, and terminated on March 31, 2011.

The incident that led to the claimant's termination occurred on March 29, 2011. The claimant was scheduled to open the store that morning. The claimant's alarm did not go off and the claimant was late to work. The parties do not agree on the length of time the store went unopened. The claimant believes that she was ten minutes late and the employer's position is that the claimant was one hour and twenty minutes late.

The claimant had been previously warned about not opening the store on time on February 12, 2010, and June 4, 2010. The claimant was also given a warning on March 7, 2011, for having turned off her phone. Another warning was given on March 25, 2011, for leaving the store for a couple of hours.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Misconduct excludes unsatisfactory performance and errors of judgment or discretion in isolated situations. In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of

misconduct. See 871 IAC 24.32(8) See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to establish misconduct.

The incident that led to the claimant's termination occurred on March 29, 2011. The claimant overslept and was late opening the store. Her alarm did not go off and her cell phone was not working. When she did wake up, she went to work immediately and called her supervisor to let her know what happened. The claimant said she was ten minutes late whereas the employer said the absence was one hour and twenty minutes. If this case was analyzed as misconduct for excessive unexcused absenteeism, this final absence would be considered unexcused because oversleeping is considered a matter of personal responsibility.

The claimant, however, was not discharged for excessive unexcused absenteeism. She was terminated for what the employer believed was a failure on her part to follow company policies and procedures. The claimant had been given both written and oral warnings for not opening the store on time; not having sufficient coverage on shift; and turning off her cell phone. Clearly the employee's work performance was not to the employer's satisfaction. The administrative law judge concludes that the final incident that led to the claimant's termination cannot be deemed misconduct as that term is defined in unemployment insurance law. The claimant did not willfully or deliberately break a store rule or policy. She overslept. Under these circumstances, there is insufficient evidence of misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 20, 2011, reference 02, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs