IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DENISE K VALASEK
Claimant

PRO-NET FARMS INC
Employer

APPEAL NO. 07A-UI-09255-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/19/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Denise K. Valasek (claimant) appealed a representative's September 21, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Pro-Net Farms, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on November 28, 2007. This appeal was consolidated for hearing with a related appeal, 07A-UI-08675-D, regarding another claimant, Amy VanSabben. The claimant participated in the hearing and presented testimony from one other witness, Amy VanSabben, who was represented by Jeffrey Grieve, attorney at law. Harold White, attorney at law, appeared on the employer's behalf and presented testimony from two witnesses, Jan Radke and Marlys Corn. During the hearing, Employer's Exhibits One through Seven were entered into evidence. 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?

FINDINGS OF FACT:

The claimant started working for the employer on April 11, 2007. She worked full time as a farrowing assistant in the employer's Stacyville, Iowa, swine breeding and farrowing operation. Her last day of work was August 20, 2007. The employer discharged her on that date. The reason asserted for the discharge was failing to remove t-shirts from the premises that the employer deemed in violation of the employer's sexual harassment policy and allegedly being insubordinate in disobeying a directive to be on suspension.

The claimant received a copy of the employer's policy handbook on or about April 11, 2007; the policy includes a prohibition against sexual harassment. In late July or early August when Ms. Corn, the employer's director of sow production, had visited the Stacyville farm and had observed there were female employees who were wearing company-provided t-shirts that had been altered with at least questionable innuendo. Part of the process in the facility was that sows that were in heat and that were ready for breeding were to be marked with an X on their

backs with a semi-permanent silver paint stick. Someone, apparently a former male employee, had taken some of the claimant's and Ms. VanSabben's work t-shirts, and had drawn a large X on some and on another had written "Do it" with an arrow pointing down. Upon seeing these t-shirts, Ms. Corn did not speak with the employees directly but spoke to the site supervisor, instructing him that the shirts were to be removed from the premises.

The site supervisor then spoke to the claimant and Ms. VanSabben in about early August, informing them of Ms. Corn's concern and desire that the shirts be removed from the premises. The two employees responded to the site supervisor that they would then need to have some new t-shirts ordered, as for contamination prevention reasons they could only wear clothing on-site that had never been exposed to any other hog location and the other available t-shirts on site were too small. The site supervisor then instructed them that they could wear the tee shirts inside out so the markings could not be seen, and that they should avoid wearing the shirts when they knew Ms. Corn would be on the premises. The claimant did not wear a marked t-shirt other than inside out after that discussion.

On August 8 the site supervisor called the claimant at approximately midnight regarding some complaints the claimant had with other employees. He initially told her that he was going to place her on suspension until he returned from a vacation on August 15; when the claimant protested, he agreed that she could go ahead and return to work but that they would have a meeting when he returned. He later told Ms. Corn that he had placed the claimant on suspension and that her returning to work on and after August 9 had been contrary to his directive.

On August 9 the claimant and Ms. VanSabben informed Ms. Corn that they felt the site supervisor was acting inappropriately and was engaging in sexual harassment of them. Ms. Corn relayed this information to Ms. Radke on or about August 10, who then began in inquiry of employees at the location. As follow-up to the investigation, on or about August 17 Ms. Corn did an inspection of the locker and shower area and found that several of the marked shirts were still on the premises, at least one of which was with the claimant's clothing items. Concluding that the claimant was continuing to wear the shirt after having been instructed to remove it from the premises and that she had been insubordinate by continuing to report for work after being suspended by the site supervisor, the employer discharged the claimant.

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).

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.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. Assessing the credibility of the witnesses and reliability of the evidence, in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not established disqualifying misconduct by a preponderance of the evidence. The reason cited by the employer for discharging the claimant is her alleged insubordination by not abiding by the

site supervisor's suspension directive and failing to dispose of the altered t-shirts. However, the claimant's firsthand testimony was that the site supervisor had lifted his initial suspension directive. No witness was available at the hearing to provide firsthand testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the secondhand account from the site supervisor; however, without that information being provided firsthand, the administrative law judge is unable to ascertain whether the site supervisor is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of his report. Under the circumstances of this case, the administrative law judge concludes that the claimant's testimony is more credible.

As to the continued presence of the t-shirts, even though it may have gone against the wishes of Ms. Corn, who was the site supervisor's manager, the site supervisor did in fact advise the claimant that she could continue to wear the shirts so long as they were worn inside out. The site supervisor had the apparent authority to modify the instruction so that the purpose of not displaying the objectionable marking could still be met; the claimant reasonably relied upon the site supervisor's apparent authority to modify the instruction and did comply with the modified instruction to the best of her ability. At worst, her mis-reliance on the site supervisor's modified instruction was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion, as compared to intentional, substantial, or repeated misbehavior. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer 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 21, 2007 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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