IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

CARLOS DOMINGUEZ Claimant **HY-VEE INC** Employer	**APPEAL NO. 19A-UI-07837-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/08/19** **Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated October 1, 2019, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on November 14, 2019. Claimant participated personally. Employer participated by hearing representative Erin Bewley and witnesses Jamie Renken, Lee Kenyon and Alma Mameledzija. Claimant's Exhibits A-J and Employer's Exhibits 1-9 were admitted into evidence. Interpretive services were provided by CTS Language Link.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on September 11, 2019. Employer discharged claimant on September 11, 2019 because claimant amassed points in excess of those necessary to terminate under employer's attendance policy.

Claimant worked as an order selector for employer. At the time of hire in September, 2019 claimant received a written copy of the employer's attendance policy. Claimant received warnings including a final warning for being within one point of those necessary for termination on June 12, 2019. On July 7, 2019, claimant injured his shin at work. Claimant had an ongoing worker's compensation case going and on August 23, 2019 claimant obtained an updated work restriction stating that claimant was to work in a seated manner with standing or walking "as tolerated."

On August 25, 2019 claimant called off from work in a timely manner stating that his foot pain was such that he couldn't make it in that day. Employer gave claimant an attendance point for this absence and on September 9, 2019 claimant was terminated for having eight attendance points.

In early August, 2019 employer stated that they changed policies regarding employees on workers' compensation and how their absences were viewed. Moving forward, employer stated that people on worker's compensation could not simply call off work without obtaining an updated restriction notice from a doctor. Otherwise, they would be given a point for their absence. Employer stated they called claimant to tell of this information. Claimant stated that he was never called by employer and pointed out that on the day employer stated they called claimant the call was actually from claimant to the employer and not from the employer to the claimant. Claimant stated he had no idea about the change in policy and didn't receive any document indicating this. (Claimant has Spanish as his primary language, and employer stated that he speaks English when talking to claimant and then asks if he understands. If there is confusion, employer, who also speaks Spanish, will clarify in Spanish.)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a. 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers,* 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.,* 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.,* 478 N.W.2d 432, 434 (Iowa Ct. App. 1991). In this matter, employer did not provide proof that claimant was informed in employer's change in its calculating of days off when on worker's compensation.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning coming to work when injured and on restriction as a result of employer's recently changed policies.

The last incident, which brought about the discharge, fails to constitute misconduct because employer was on worker's compensation. Two days before claimant called off work employer was informed that claimant should be seated doing his work, walking or standing only when able. Claimant stated he did more work than simply sitting. He called into work timely, and shared that he was not able to come into work because of his work injury. Employer didn't ask claimant to go to the doctor again. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated October 1, 2019, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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