IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

CHRISTOPHER A MCGUIRE Claimant **AGRI-WAY PARTNERS LLC** Employer	**APPEAL NO. 17A-UI-09267-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/06/17** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 30, 2017, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 28, 2017. Claimant participated personally. Employer participated by Jeff Sell, Rhonda Shelman and Wyatt Ross. Employer's Exhibits 1-4 were admitted into evidence.

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 July 28, 2017. Employer discharged claimant on July 31, 2017, because claimant didn't show up for work on July 30, 2017 after receiving two warnings for attendance.

Employer asked claimant to work on Sunday, July 30, 2017 to help with feed delivery. In the six months of claimant's employment with employer, claimant had only worked Monday through Friday, with the exception of one Sunday, when claimant was given the option of whether he wished to work or not. Claimant chose to work that day.
On July 26, 2017, claimant was first informed that he might have to work on June 30, 2017. Claimant explained that he couldn't work on that date as there was no one to babysit claimant's daughter, and he was a single parent. The next day, claimant stated that he went into the office of his scheduler, and apologized for his aggressive response the day prior. At that time, claimant said employer did not demand claimant work on Sunday. Later in the day, two of employer's witnesses stated that claimant was told that he needed to work on Sunday. Employer's witnesses said that claimant responded by asking if he would then get Friday off if he worked on Sunday. Employer responded that they didn't know whether claimant would need to work on Friday, but that his working on Sunday wouldn't necessarily mean that he gets Friday off from work. Claimant denied the entirety of this second conversation on Thursday.

Claimant didn't show up on Sunday at all. Employer texted claimant around 9:00 p.m. but claimant didn't respond. The next day, employer called claimant and left a message for claimant to call employer. Claimant didn't return a call, but came into work at his regularly scheduled time on Monday to work his shift. Claimant was told that he was terminated after arrival.

Claimant had received two warnings surrounding his ability to get to work on time and stay at work prior to his termination. Employer stated claimant had been tardy on numerous other occasions apart from the warnings.

Claimant stated that he was never informed of any progressive discipline, other than verbally, and the verbal statements said that claimant would be suspended on the third disciplinary and terminated upon a forth action. Employer stated he told claimant that claimant may be terminated upon the third action if that action was sufficient to warrant termination. The instant action was claimant's third disciplinary action.

Upon hire, claimant stated that he told employer of his responsibilities as a single parent. Employer stated at the time of hire that claimant was informed that he might need to work on weekends. Claimant had only worked one day on a weekend prior to the Sunday in question, and that day claimant had the choice of whether or not he chose to work.

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.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). 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.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, Id. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, Id.

In this matter, employers' statements regarding requiring claimant to be at work on Sunday hold sway with the administrative law judge. The specifics mentioned by both the logistics manager and the feed mill supervisor indicated that claimant did understand that he needed to be at work. The fact that both witnesses mentioned claimant's attempt to get the next Friday off of work lends to the credibility of their statements. Claimant's statement that this conversation never occurred is deemed less credible.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the

absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy. The last incident, which brought about the discharge, constitutes misconduct because claimant had been repeatedly warned about absenteeism and tardiness, knew that he might have to work weekends, and was alerted beforehand that he needed to work on Sunday. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 30, 2017, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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