IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVION GIVENS Claimant **SOUTHERN HOSPITALITY VENTURES INC** Employer	**APPEAL 20A-UI-10914-BH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/10/20** **Claimant: Appellant (2)**

Iowa Code section 96.5(1) – Voluntary Quit
Iowa Administrative Code rule 871-24.25 – Voluntary Quit Without Good Cause
Iowa Code section 96.5(2)(*a*) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(1)(*a*) – Discharge for Misconduct

STATEMENT OF THE CASE:

Davion Givens appealed the August 27, 2020 (reference 02) unemployment insurance decision that denied benefits. The agency properly notified the parties of the hearing. The undersigned presided over a telephone hearing on October 19, 2020. Givens participated personally and testified. Southern Hospitality Ventures, Inc. (SHV) did not participate.

ISSUE:

Was Givens's separation from employment with SHV a layoff, discharge for misconduct, or voluntary quit without good cause attributable to the employer?

Did SHV discharge Givens for job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the undersigned finds the following facts.

SHV hired Givens in or around late July or August of 2019. Givens worked part time as a crew worker. SHV discharged Givens on January 5, 2020.

An individual named Patrick was Givens's immediate supervisor. In late December, Givens became ill with a respiratory condition. He communicated with Patrick regarding his condition. Patrick told Givens to contact him when his symptoms subsided and he was healthy enough to return to work.

Givens's illness lasted months. He experienced symptoms including a fever, cough, and congestion. He could not perform activities of daily living because he would get short of breath. Ultimately, he moved in with his mother, who cared for him.

Givens attempted to go to MercyOne in late March or early April. They would not let him into the facility because they did not have enough resources to provide care for him. The staff person Givens spoke with told him that he likely had COVID-19, that he should be able to fight it off because of his young age, and that he should go home and self-quarantine until he is symptom free for several days.

After Givens experienced a reduction in his symptoms, he contacted SHV and asked to speak to his immediate supervisor, Patrick. Givens found out that Patrick no longer worked for SHV. He asked if they had work available. SHV advised him that he should not work if he might have COVID-19 and he should file a claim for unemployment insurance benefits.

Givens did not intend to quit his job with SHV. He needed to earn money to pay his bills. Givens interpreted SHV telling him to file for unemployment insurance benefits to mean SHV had discharged him.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes SHV discharged Givens from employment for no disqualifying reason.

In appeals such as this one, the issue is not whether the employer made a correct decision in discharging claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

Under Iowa Code section 96.5(2)(*a*), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment. The statute does not define "misconduct." But Iowa Administrative Code rule 871-24.32(1)(*a*) does:

> "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 Supreme Court has ruled this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Administrative Code rule 871-24.32(4) states:

> The claimant's statement and the 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.

Under Iowa Administrative Code rule 871-24.32(8),

> 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.

Further, 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 issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

Rule 871-24.32(7) provides:

> Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Excessive absences are not considered misconduct unless unexcused. The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, 321 N.W.2d at 9; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id.*; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003). The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness; and an incident of tardiness is a limited absence.

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*,

2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

As the employer, SHV has the burden of proof in this appeal. It must prove it discharged Givens for misconduct in order to disqualify him from benefits. But SHV did not participate in the hearing or present evidence. Under rule 871-24.32(4), "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 contrast to SHV, Givens participated in the hearing and gave credible sworn testimony. He fell ill with a respiratory condition. Givens kept his immediate supervisor, Patrick, informed of his illness. Ultimately, he and Patrick reached an agreement that Givens would let Patrick know when he was feeling better.

Givens followed the terms of the agreement with Patrick. But his symptoms lasted for an extended period of time. Ultimately, Givens' healthcare provider told him he likely had COVID-19, that it did not have the resources to give him care, and advised him to self-quarantine until he was symptom free for a period of time. Givens did as instructed by his healthcare provider. It is more likely than not that the period of absence Givens had from work with SHV was caused by him contracting an illness, most likely COVID-19.

Givens reached out to SHV about returning to work. He found out Patrick was no longer his supervisor. SHV advised him to file for unemployment insurance benefits. It is more likely than not that SHV ended its employment relationship with Givens at this time.

For these reasons, SHV has failed to meet its burden to prove misconduct by Givens. The evidence stablishes it is more likely than not that SHV discharged Givens for no disqualifying reason. Benefits are allowed, provided Givens is otherwise eligible under the law.

DECISION:

The August 27, 2020 (reference 02) unemployment insurance decision is reversed. SHV discharged Givens from employment for no disqualifying reason. Benefits are allowed, provided Givens is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Ben Humphrey
Administrative Law Judge

October 20, 2020
Decision Dated and Mailed

bh/sam