Iowa Department of Inspections and Appeals
Administrative Hearings Division
Wallace State Office Building, Third Floor
Des Moines, Iowa 50319

Amber Sorensen, 525 NE 8th Street Ankeny, IA 50021,	)	DIA Case No. 19IWDUI0001 IWD Appeal No. 18A-UI-08172
Appellant,	)	**ADMINISTRATIVE LAW JUDGE DECISION**
v.	)	
Iowa Workforce Development,	)	OC: 12/03/2017 Claimant: Appellant (1)
Respondent.	)	

Iowa Code section 96.5-2 – Cause for disqualification

STATEMENT OF THE CASE

The Claimant Amber Sorensen ("Sorensen") filed an appeal from a July 16, 2018, decision by Iowa Workforce Development ("IWD") finding she was ineligible for unemployment insurance benefits because she was terminated for misconduct. The hearing commenced on September 11, 2018. At the hearing, both parties called witnesses and submitted all documents. IWD was represented by Benjamin Humphrey. Sorensen was represented by non-attorney representative Paul Jahnke. The entire administrative file, including all of the exhibits submitted by the parties, was entered into the record. The matter is now fully submitted.

ISSUE

Whether IWD properly determined Sorensen was ineligible for unemployment insurance benefits because she was discharged by IWD for misconduct in connection with her employment.

STATEMENT OF FACTS

Amber Sorensen became an employee of IWD on March 23, 2018 as an Accountant 2. On March 23, 2018, Sorensen signed an acknowledgement letter verifying she has received and understands IWD rules for employees. (IWD Exs. D; E; J) It appears throughout her short employment her hours varied between the standard 8:00am to 4:30pm schedule and the modified 7:30am to 4:00pm schedule. It is clear that Sorensen preferred the modified schedule of 7:30am to 4:00pm. On May 11, 2018, Jessica Livingston, who is Sorensen's manager, emailed Sorensen to inform her that she is required to work the standard 8:00am to 4:30pm schedule. (IWD Ex. A) However, just ten days later, Livingston informed Sorensen that she could go back to the modified schedule. (IWD Ex. B) On July 11, 2018, Livingston informed

Sorensen by email that her hours would again revert to the standard 8:00am to 4:30pm schedule effective July 13, 2018. (IWD Ex. C)

It appears Sorensen had alerted Livingston in the week prior to her discharge that her son was having some health issues. Livingston testified that she told Sorensen if she needs to leave, she needed to alert her or another manager verbally or submit a leave request. However, Livingston also said that if an emergency happens, Sorensen could just leave and submit a leave request upon her return to the office.

Upon notification on July 11 that her hours were changing again, it appears Sorensen was upset and drafted a letter explaining her position. Sorensen also met Livingston in person to discuss her hours. However, the content of this conversation is disputed. Livingston in her employer statement to the fact-finder wrote that Sorensen told her "she could come as go as she pleased". During testimony for this hearing, Livingston testified that Sorensen said her husband told her that no one would know if she left the office early. Sorensen claims she stated in this conversation that the she was upset with coworkers for commenting on her hours and that they should not be concerned with what her hours are. There was testimony that other IWD employees were upset that Sorensen had modified hours. She denies ever saying that she believed she could leave whenever she wanted. Sorensen's husband, Dick Sorensen, also testified that he never had a conversation with his wife about no one being able to know if she left early. He would not have been present for the conversation in question though. In the end, this judge is not convinced either way what the content of this conversation was. However, I believe that Sorensen's account is probably more probably due to it being unlikely that an employee would state to their supervisor that they can leave whenever they want or their spouse said they could leave undetected.

The root of the termination emanates from events on July 13, 2018. This was also the day that Sorensen's hours reverted to the standard 8:00am to 4:30pm schedule. Sorensen advised Livingston in the morning that her son required a nebulizer treatment and she would be checking in with his daycare to ensure he was doing fine. Livingston estimates that Sorensen visited her workspace five times throughout the day but only twice updating her on Sorensen's child. She testified that the two times she was updated on the child, the prognosis seemed good. Livingston thought Sorensen's purpose for coming down to her office area as often as she did was to see when she left so Sorensen could more easily leave undetected. Livingston testified that Sorensen was aware that she was hoping to leave the office early. Multiple times Sorensen remarked to Livingston, "you're still here? I thought you were leaving early". Sorensen denies that this was her purpose. She claims that she was merely updating her supervisor on her son's health status and retrieving work. This judge finds that it would be a stretch to assume Sorensen's sole purpose was to see when Livingston would leave so she could leave. I am not saying that was not the purpose but because Sorensen's work had to be retrieved downstairs by Livingston, it is not surprising that she would be down there multiple times per day. Further, as Sorensen and Livingston discussed her child's health previously and the possible need to leave, it is does not seem unusual for these interactions to happen.

It is undisputed that Sorensen left her work station early that day by roughly one half hour. At 3:56pm on July 13, 2018, Sorensen sent a text message to Livingston stating, "Hope you have a great weekend Have some "adult" coffee :)". Livingston then confirmed with both Jodi Douglas and Barb Corso that Sorensen did leave the office shortly before 4:00pm. Corso also confirmed that Sorensen had not submitted a leave request prior to leaving. Based on this information, it was determined that the issue would be dealt with on Monday and Livingston upon advice did not reply to Sorensen's message.

On Monday, July 16, 2018, Sorensen went downstairs to Livingston's office between 7:30am and 7:45am. Livingston was on the phone however and she waved off Sorensen by pointing to her phone. Sorensen claims that she came down to advise Livingston why she left early the previous Friday and to ask for help with submitting a leave request. Shortly later, Sorensen was summoned for a meeting with Livingston and Carrie O'Brien who is a tax bureau chief with IWD. It appeared this meeting was going to result in Sorensen's termination unless Sorensen had a good reason for her absence. In the end, they believed there was not good reason for her absence and she was terminated effective immediately. O'Brien stated that Sorensen was fired "due to not following basic work rules".

Some further context is needed for this case. First, it is important to look at IWD employee rules and specifically the "Tardiness" rule. Tardiness is defined as not being to your workstation on time, leaving early, and not being timely returning from break. (IWD Ex. E) "Excessive tardiness will not be tolerated." Id. The rule states that an employee must notify their supervisor if they leave before the end of their shift. Id. Further, the type of notification to give is determined by the supervisor. Id. If management determines that an incidence of tardiness is excused, the employee can have the time deducted from their available sick or vacation time. Id. If the tardiness is not excused, the time will be determined to be leave without pay. Id.

It appears some of the scheduling changes referenced earlier had to deal with IWD employees in a different division being unhappy that Sorensen could have a modified work schedule but they were not allowed the same flexibility. Livingston testified that some of these employees inquired of their manager why Sorensen was allowed a different schedule and reported that Sorensen was still leaving before her 4:00pm end of shift. However, this judge is not giving much credence to this report, as it is hearsay of hearsay. While hearsay is allowed in administrative hearings, the multiple levels of it here cause this judge concern. Nonetheless, it is the employer's burden, if they wanted to use this as a basis for termination and denying unemployment insurance, they should have provided more robust evidence supporting it.

There is also a phone-based clocking in and out system that employees of IWD utilize. Livingston claims that Sorensen failed to use this system as instructed. While using this system is not found in the rules provided, Livingston claimed that emails were sent to all employees requiring that it be used. Livingston testified that in the week prior to Sorensen's termination, she was the only employee who did not properly use this system. However, multiple times IWD stated that this was a more minor concern and did not cause the termination. They also testified that no one has been terminated due to failure to use the system.

No direct written or verbal warnings were provided to Sorensen by IWD staff. IWD argues that the fact that Sorensen was on probation was warning enough as she could be fired without the right of appeal. However, no specific warning was ever given to Sorensen regarding tardiness, using the phone clocking in/out system, or for any other reason. While being on probation does carry a level of caution, it does not amount to a warning.

There is also evidence showing that Sorensen had completed leave requests in the past. (IWD Exs. F; G;H) There is also evidence showing the process for submitting a leave request. (IWD Ex. F) However,

Sorensen claims that she struggled with the process and required help for every leave request she submitted.

CONCLUSIONS OF LAW

A.

"The purpose of [Iowa's] unemployment compensation law is to protect from financial hardship workers who become unemployed through no fault of their own." Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). As a result, the governing employment provisions "should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

As part of the statutory framework, an individual is disqualified from receiving unemployment benefits when he or she has been discharged for "misconduct." Iowa Code § 96.5(2). "Misconduct" is defined by the governing regulations to be "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." 871 Iowa Administrative Code § 24.32(1)(a); see also Freeland v. Employment Appeal Board, 492 N.W.2d 193, 196 (Iowa 1992) (noting that "the agency rule definition is an accurate reflection of legislative intent"). In explaining what this means, the governing regulation states:

> 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 I.A.C. § 24.32(1). Summarizing this, "[m]isconduct must be substantial in order to support a disqualification from unemployment benefits." Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986).

For failing to follow instructions, Iowa courts have long held "an employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause." Woods v. Iowa Dep't of Job Serv., 327 N.W.2d 768, 771 (Iowa Ct. App. 1982). Key considerations are both the reasonableness of the employer's request and the employee's refusal in light of the circumstances at the time of the refusal. Endicott v. Iowa Dep't of Job Serv., 367 N.W.2d 300, 304 (Iowa Ct. App. 1985). The tests for reasonableness is objective and does not depend upon the subjective impressions and feeling of an individual. Aalbers v. Iowa Dep't of Job Serv., 431 N.W.2d 330, 336 (Iowa 1988). Circumstances that have been found to create good cause to refuse an employer's instructions include harassment, safety, and confusion as to what was being required, while circumstances that have been found to be insufficient

include modest requests for overtime. Woodbury Cty. v. Employment Appeal Bd., 683 N.W.2d 127 (Iowa Ct. App. 2004); Bruce v. Employment Appeal Board, 1999WL 7755986 (Iowa Ct. App. Sept. 29, 1999); Pierce v. Iowa Dep't of Job Serv., 425 N.W.2d 679, 681 (Iowa Ct. App. 1988);Woods, 327 N.W.2d at 771; Endicott, 367 N.W.2d at 304.

Importantly, "[m]isconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits." Henry, 391 N.W.2d at 734. In fact, "[w]hat constitutes misconduct justifying termination of an employee, and what is misconduct which warrants denial of unemployment benefits are two separate decisions." Brown v. Iowa Dept. of Job Service, 367 N.W.2d 305, 306 (Iowa App. 1985). By statute, "[t]he employer has the burden of proving a claimant is disqualified for benefits." Bartelt v. Employment Appeal Bd., 494 N.W.2d 684, 686 (Iowa 1993) (citing Iowa Code § 96.6(2)).

B.

In this case, Sorensen's failure to give verbal notification to a supervisor prior to leaving has not been shown to meet the definition of misconduct. While this judge thinks that discharge may have been appropriate, the facts do not surpass the high burden necessary to deny unemployment insurance. It appears the main basis for termination were events that occurred on July 13, 2018. Sorensen had informed Livingston throughout the week that her son was having complications due to asthma. Livingston made clear that family, in most circumstances, comes first and with approval she can leave to tend to her son as she has plenty of sick time. However, Livingston also said if it is an emergency, she can leave immediately and file a leave request on her return. The ability to file a leave request upon return is also available to employees in the IWD manual. (IWD Ex. E)

IWD through hearsay evidence states that there were multiple occurrences of Sorensen leaving before the end of her shift. However, this was through witnesses that were upset that they also did not have the option of working a modified shift. There is also the concern about hearsay noted earlier. Further, this argument loses credibility because Sorensen was never warned by her supervisor, or by anyone else, verbally or in writing, that she has been observed leaving early and that behavior was to cease. Frankly, this judge thinks if it was such a problem, there would have been a record about it or a conversation about it if it happened as described.

Next, comes the allegation about Sorensen failing to use the phone system to clock in and out. IWD minimized this as an issue during the hearing. Further, it does not appear that it was mentioned at all during the fact-finding interview. As IWD as the burden of proof, they should have and could have easily submitted evidence showing her non-compliance. They did not. Sorensen does not deny there may have been times where she forgot but this behavior also does not rise to level of misconduct. Further, it appears that IWD did not treat this failure to use the phone system as misconduct so neither will this judge.

There was not a pattern of tardiness established in this case and until this hearing; excessive tardiness really was not even alleged. Which means this case comes down to the one undisputed event of tardiness on July 13, 2018. Sorensen claims that she left work early to care for her son. She submitted a doctor's note from July 12, 2018 where the doctor states that Sorenson's son "will need parental care until stabilized." Livingston believes that Sorensen more or less left early because she was upset about her

hours. She found several conversations confusing and concerning. Livingston assumes that Sorensen visited with her so many times on July 13, 2018, to see when she left. However, this judge believes that is an unfair assumption.

The only piece of evidence that gives this judge pause is the text message that Sorensen sent to Livingston when she left. The tone of that message just does not seem to match up with the urgency of the situation of leaving work to care for her son. Frankly, the tone and content is almost inappropriate to text message to a supervisor in any situation but especially in this circumstance. While this raises a brow, it is not enough to infer that her sick child was not the reason she left.

The instruction violated in this case was failure to follow the instruction of notifying a supervisor. As cited above, it is important to look whether there was good cause to comply with the instruction. See Woods. This judge finds that the employer's request to notify a supervisor before an employee leaves is reasonable. However, Livingston also informed Sorensen that she could leave immediately if there was an emergency and she could file a leave request on her return. Sorensen attempted to go to Livingston's office at 7:30am the next morning of work. This judge believes that she went down to ask about filing a leave request. Therefore, she was comporting with both the manual and the instruction given by the manager. Regardless though, this judge finds it was more likely than not that Sorensen left to provide treatment to her child on July 13. This is the definition of good cause. IWD's belief that she left out of anger of her hours changing is based on assumptions regarding disputed conversations and actions. Sorensen has provided a document signed by a doctor just the day before this incident that establishes her child was ill and requires treatment. There is just more verifiable evidence from the claimant.

While the claimant probably should have found some manager to tell verbally or have been more clear with her text message, the fact is when you are alerted about a sick family member you react. Her direct supervisor had already left for the day and she said the nearest manager is someone she has no relationship. While slightly confounding, nothing here amounts to labeling the leave as misconduct. It would have also been ideal if Sorensen had taken the minute to file a leave request. However, she claims that she has always struggled with this task and tried seeking help the next Monday from Livingston. While the task of submitting a leave request looks easy to this judge, it would be unfair for me to assume that it is easy to everyone. It is clear Sorensen had submitted leave requests in the past but Sorensen claims she has required help with every request and had a further question about what type of leave she needed to request here. I do not find this outside the scope of reasonable.

As Sorensen was a probationary employee and therefore employed at-will, IWD was seemingly within their right to terminate her. The question that remains is did IWD prove that Sorensen's conduct that lead to her termination meet the definition of misconduct. This judge finds that the evidence and testimony submitted does not support that conclusion. This judge does not rule out that Sorensen was mad and just left early but it would be impossible for me to believe that this scenario was more likely the case than her leaving to tend to her child. As IWD holds the burden and has not met their burden, this judge must REVERSE IWD's decision.

DECISION

IWD's decision is REVERSED. IWD shall take all necessary measures to effectuate this decision.

IT IS SO ORDERED.

Dated and mailed this September 24, 2018.

Thomas J. Augustine
Administrative Law Judge

cc: Paul Jahnke, Non-Attorney Representative for Amber Sorensen (By Mail)
Emily Chafa, IWD UI Appeals Manager (By Email)
Nicholas Olivencia, IWD (By Email)
Joni Benson, IWD (By Email)
Kevin Melcher, IWD (By email)
Brenda Boten, IWD (By email)
Ryan West, IWD (By email)

APPEAL RIGHTS

This decision shall become final agency action unless the Appellant or any interested party appeals to the Employment Appeal Board within fifteen (15) days after the date of this decision by submitting a signed letter or a signed written Notice of Appeal by mail, personal delivery, or fax to:

Employment Appeal Board
Lucas State Office Building, 4th Floor
Des Moines, Iowa 50319
(515) 281-7191 (fax)

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

An appeal to the Employment Appeal Board must:

- Include the name, address, and social security number of the claimant;
- Reference the decision from which the appeal is taken;
- Clearly state that an appeal from such decision is being made;
- Clearly state the grounds upon which such appeal is based; and
- Be signed by the party appealing.

On appeal to the Employment Appeal Board, the Appellant may represent himself or herself or may obtain the assistance of an attorney or another representative at the Appellant's own expense. The Appellant may qualify for free legal assistance from Iowa Legal Aid. To apply, call Iowa Legal Aid at **(800) 532-1272** or visit **www.iowalegalaid.org**. More information about obtaining legal advice is also available on the Administrative Hearings Division website at **http://dia.iowa.gov/ahd/**. The claimant should continue to file weekly claims for unemployment insurance benefits while the appeal is pending. A claimant can only receive benefits for the weeks he or she filed a valid claim.