**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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| **MICHAEL M TAYLOR**<br>Claimant<br><br>**ACADEMY ROOFING & SHEET METAL**<br>Employer | **APPEAL 17A-UI-12877-JCT**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 09/10/17**<br>**Claimant: Appellant (2)** |

Iowa Code § 96.5(2)a – Discharge for Misconduct

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the December 15, 2017, (reference 04) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 9, 2018. The claimant participated personally. The employer participated through Diane Parker, director of human resources, and Dan Loupee superintendent. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a roofer beginning November 8, 2017, and was separated from employment on November 20, 2017, when he was discharged.

The claimant worked for three days for the employer: November 8, 9 and 10. He was originally slated to begin work on November 6, 2017, but reported to the employer, he was dealing with an identity theft matter. On November 7, 2017, the claimant reported he would not begin work because he hit a deer and "totaled" his car. On November 8, 9 and 10, the claimant performed work. On November 13, 2017, the claimant emailed Ms. Parker, reporting his grandmother had a stroke. On November 14, 2017, the claimant emailed Ms. Parker again, and then later emailed a second time to let the employer know his grandmother had passed away. On November 15, 2017, the claimant stated via email he would be taking Wednesday and Thursday off to be with his family but would return to work on Friday. On Friday, November 17, 2017, the claimant sent an email to the employer at 4:57 a.m. stating he would be staying home to console his children. On November 20, 2017, the claimant sent an email to the employer at 4:38 a.m. stating he had returned from the emergency room. The claimant reportedly had hurt

his back, while acting in haste to retrieve logs during the bonfire for the celebration of his grandmother's life. On November 20, 2017, after the employer had to fill the claimant's position due to business needs, he was discharged.

The employer's written policy, which the claimant received at hire, requires employees to contact their foreman or superintendent within 30 minutes of start time. The employer's policy explicitly states text messages are not permitted to report absences. The claimant received the employer policies at hire and stated he did not have a cell phone, but had two landlines with frequent outages. Between November 13 and 20, 2017, the claimant did not make any contact with his foreman or superintendent to report absences. The undisputed evidence is that the claimant was issued no warnings regarding his failure to follow the employer's notification policy, which required phone calls, nor was he advised that if he did not return to work or had continued absences, that he would be discharged.

**REASONING AND CONCLUSIONS OF LAW:**

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

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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).

Iowa Admin. Code r. 871-24.32(7) provides:

> (7) Excessive unexcused absenteeism. 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.

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 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. *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. *Id*. 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 satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

In the claimant's short employment history, he was absent November 6, 7, 13, 14, 15, 16, 17, and 20, 2017. He only worked November 8, 9 and 10, 2017. The claimant did not once follow the employer's notification policy which prohibits text messaging and requires a phone call 30 minutes in advance of the shift to a foreman or superintendent. The administrative law judge is persuaded that an email is akin to a text message, inasmuch as it is written, unilateral communication, rather than interaction with an employee. The administrative law judge is not persuaded the claimant's lack of possession of a cell phone excused his failure to follow the employer's notification policies. However, at no time, did the employer tell the claimant his method of reporting absences was unacceptable, nor did the employer tell the claimant his job was in jeopardy based upon the frequency of his absences, which he attributed to identity theft,

hitting a deer, his grandmother's death, and subsequent injury during her celebration of life bonfire.

The administrative law judge is sympathetic to the reasonable positions of each party because of the failure to communicate promptly and clearly with each other, however, the employer carries the burden of proof in a discharge from employment. Although the claimant was absent without properly reporting such to the employer, and those absences would generally be considered unexcused, since the employer had not previously warned claimant about its specific expectations about reporting, frequency of absences, or arranging absences in advance, it has not met the burden of proof to establish that the claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee might even infer employer acquiescence after multiple improperly absences without warning or counseling.

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. Training or general notice to staff about a policy is not considered a disciplinary warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer has not met its burden of proof to establish a current or final act of misconduct, and, without such, the history of other incidents need not be examined.

Nothing in this decision should be interpreted as a condemnation of the employer's right to terminate the claimant for violating its policies and procedures. The employer had a right to follow its policies and procedures. The analysis of unemployment insurance eligibility, however, does not end there. This ruling simply holds that the employer did not meet its burden of proof to establish the claimant's conduct leading to separation was misconduct under Iowa law.

**DECISION:**

The December 15, 2017, (reference 04) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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