IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JASON DANIELSON Claimant **NATIONWIDE MUTUAL INSURANCE CO** Employer	**APPEAL 21A-UI-02985-SN-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/11/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(1) – Voluntary Quit

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 8, 2021, (reference 01) unemployment insurance decision that denied benefits based the conclusion he was discharged from work for failure to follow instructions. The parties were properly notified about the hearing. A telephone hearing was held on March 15, 2021. Claimant participated and testified. Employer participated through Senior Consultant Office of Associate Relations Seema Anand.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

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 senior analyst in information technology (IT) operations from February 8, 2010 until he was separated from employment on September 25, 2020, when he quit. His immediate supervisor was Manger of IT Operations Jason Bender.

The employer has a misconduct policy in its employee manual. One of its provisions, states failure or refusal to comply with a work order will result in immediate termination.

On February 3, 2020, the claimant went on administrative leave after reporting to the employer that he believed he was being tracked by an ex-girlfriend through an application on his cell phone called Life 360. The claimant believed this application had been installed on his computer by his ex-girlfriend, in order to stalk him.

On July 16, 2020, the claimant returned from his administrative leave. He was not asked to undergo a fitness evaluation prior to returning from this leave.

On August 18, 2020, the claimant left on a second paid administrative leave of absence due to concerns his ex-girlfriend was stalking him. The claimant thought he had seen his ex-girlfriend

near his residence. He also thought he had been hearing her through an application on his computer. The claimant also believed his ex-girlfriend was sending emails to his email address at work.

While the claimant was on administrative leave, the employer sent the claimant's computer to San Francisco for it to be forensically evaluated.

On September 4, 2020, Wellness and Safety Associate Janet Caldwell sent the claimant an email stating that he would have to undergo to a fitness for duty examination on September 7, 2020. The email stated the fitness for duty examination would occur in the East Tower of Mercy Hospital on level B. Later on September 4, 2020, the claimant replied back that there were many providers at that location. Ms. Caldwell explained she would be retiring. Prior to the appointment on September 7, 2020, Wellness and Safety Associate Shelly Warwick instructed the claimant to go to another appointment.

On September 7, 2020, the claimant did not attend the fitness for duty examination. This resulted in a $1000 cancellation fee for the employer.

On September 14, 2020, Ms. Warwick rescheduled the claimant's fitness for duty examination to September 23, 2020. Unlike previous invitations, this email had the precise information of the appointment.

On September 23, 2020, the claimant sent a text message to Mr. Bender. The text message expressed frustration with how many text messages he had received that day. In the text message, the claimant said he would call Associate of Wellness and Safety Shelly Warwick. However, the claimant also wrote, "But yeah. I think I may be moving on again bro." The claimant explained he had to undergo myriad mental evaluations and expressed he was trying to get back in the "flow of things."

Despite making this promise to Mr. Bender, the claimant did not speak to Ms. Warwick on September 23, 2020. He also did not attempt to attend the fitness for duty appointment. The claimant did not attempt to contact Ms. Warwick or Mr. Bender.

On September 25, 2020, the claimant received a phone call from Mr. Bender and Molly Simpkins informing him of his termination. They told him he was being terminated due to a failure to meet expectations of his job.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was due to job disqualifying misconduct:

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits:
>
> 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 individual shall be disqualified for benefits 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.

871 IAC 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

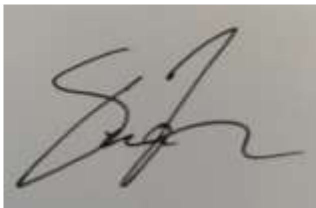
The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 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.*

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using his own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

The claimant refused to comply with the instructions for returning to work. The administrative law judge does not believe the claimant was unable to make contact with the various representatives in order to take the fitness for duty examinations. The claimant fundamentally did not believe he had to take the fitness for duty examination to return to work. The text message the claimant sent Mr. Bender on September 23, 2020 does not mention being ill. Instead, it states a reluctance to attend the fitness for duty examination as a requirement of returning to work. Although the claimant states he could not attend this second fitness for duty examination due to being sick, he conceded during the hearing that he did not call Ms. Warwick until days later to let her know why he did not attend it. The administrative law judge is sympathetic to the dire and confusing circumstances the claimant was facing. These circumstances do not excuse him from refusing to communicate with the employer in timely fashion. The employer reasonably expected some clarity on claimant's situation. Benefits are denied.

DECISION:

The October 11, 2020, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left his employment without good cause attributable to the employer. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.



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March 29, 2021____________
Decision Dated and Mailed

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