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

| | |
|---|---|
| **MICHAEL A MATHEWS**<br>Claimant<br><br>**AMERICA FIRST COMMUNITIES %ADP-UCS**<br>Employer | **APPEAL 17A-UI-10205-JP-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 09/03/17**<br>**Claimant: Appellant (2)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the September 25, 2017, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 23, 2017. Claimant participated. Attorney Harley Erbe participated on claimant's behalf. Employer participated through regional manager Emily Scarff. Employer Exhibit 1 was admitted into evidence with no objection. The employer offered Employer Exhibit 2 into evidence. Claimant objected to Employer Exhibit 2 because it contained hearsay evidence. Claimant's objection was overruled and Employer Exhibit 2 was admitted into evidence over claimant's objection.

**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: Claimant was employed full-time as a maintenance technician from February 28, 2017, and was separated from employment on August 31, 2017, when he was discharged.

The employer has an attendance policy that requires employees to show up to work on time. Employer Exhibit 1. The policy also provides that an employee will be warned for attendance infractions; employees receive a verbal warning for the first two attendance occurrences, a written warning for the third attendance occurrence, and the employee is discharged after the fourth attendance occurrence. Employer Exhibit 1. The employer requires employees contact the employer and report their absence prior to the start of their shift. Employer Exhibit 1. Claimant was aware of the employer's policy. Employer Exhibit 1. Employees also record their time on a hand written timecard. Claimant is an hourly employee and is only paid for the time he records on his timecard. Claimant has to sign his timecard to indicate it is accurate. The employer expects all employees to accurately record their hours worked on their timecards.

On August 22, 2017, claimant was tardy, but he testified he never received a warning for being late. Claimant was never warned his job was in jeopardy due to absenteeism.

A couple of days prior to August 31, 2017, the maintenance manager told claimant that the timecard he had submitted for August 22 and 23, 2017 was wrong. Claimant testified he had made a mistake when filled out his timecard; he had written his start time on August 22, 2017 as 8:00 a.m. and his start time on August 23, 2017 as 9:00 a.m. Claimant actually started at 9:00 a.m. on August 22, 2017 and 8:00 a.m. on August 23, 2017. After claimant was informed about his mistake, he went to the assistant manager. Claimant then created a new timecard to reflect his start time as 9:00 a.m. on August 22, 2017 and 8:00 a.m. on August 23, 2017. Claimant gave his new timecard to the assistant manager. Claimant testified he did not intentionally falsify his timecard. The employer still has claimant's timecards.

Ms. Scarff testified that the final incident that led to discharged occurred on August 31, 2017. Employer Exhibit 1. Ms. Scarff testified that claimant was tardy to his shift on August 31, 2017. Employer Exhibit 1. Claimant denied being tardy for his shift on August 31, 2017. Claimant denied telling the employer he was late on August 31, 2017 because of his prior surgery. Claimant testified he did have a surgery earlier that month. Claimant had worked August 28, 29, and 30, 2017, with no attendance issues. Claimant testified he arrived for his shift at 8:00 a.m. Claimant does not have to check in with anyone when he arrives; he just has to show up at the office. On August 31, 2017, claimant arrived at work at 8:00 a.m. and started his normal routine. Around 11:00 a.m., the employer brought claimant to the office. Nancy Maher handed claimant a package of papers, including a written warning for an incident that allegedly occurred on July 29, 2017, and told him he was discharged. Employer Exhibit 1. The employer did not mention anything to claimant about his timecard for August 22, 2017 when he was discharged, but included it on his termination notice that was in his packet of paperwork. Employer Exhibit 1. Claimant did not sign his termination notice. Employer Exhibit 1.

Ms. Scarff testified that the employer had given claimant multiple warnings for not answering emergency maintenance calls. Employer Exhibits 1 and 2. On July 8, 2017, claimant missed a maintenance call, but he denied receiving a verbal warning for not answering the emergency maintenance call. Claimant did not sign for any verbal warning. Claimant denied receiving a verbal warning for not answering an emergency maintenance call on July 28, 2017. Claimant did not sign for any verbal warning. On August 21, 2017, claimant was given a written warning for not answering an emergency maintenance call on August 19, 2017. Employer Exhibit 1. Claimant signed for this written warning on August 21, 2017. Employer Exhibit 1. The written warning listed his only prior warning was a verbal warning on July 8, 2017. Employer Exhibit 1. The August 21, 2017 written warning did not list any verbal or written warnings for July 28, 2017 or July 29, 2017. Employer Exhibit 1. When the employer discharged claimant on August 31, 2017, it gave him a written warning for not answering an emergency maintenance call on July 29, 2017. Employer Exhibit 1. Claimant did sign for the August 31, 2017 written warning. Employer Exhibit 1. Ms. Scarff testified she is not aware why claimant was given this written warning a month after the incident occurred.

**REASONING AND CONCLUSIONS OF LAW:**

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

It is the duty of an administrative law judge and 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, as the finder of fact, 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. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. This administrative law judge reviewed the exhibits admitted into evidence. This administrative law judge finds claimant's version of events to be more credible than the employer's recollection of those events.

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).

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.

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and 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.

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. 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.

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). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). 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).

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. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The employer discussed multiple reasons as to why claimant was discharged. Although the employer indicated claimant received multiple warnings (verbal or written) for failing to respond to maintenance calls, its testimony and evidence was contradicted by Employer Exhibit 1 and Employer Exhibit 2 and therefore this evidence is not found to be credible. Employer Exhibit 2

indicates claimant received verbal warnings on July 8 and 28, 2017 for not answering maintenance calls. However, the August 31, 2017 termination notice indicates claimant had received a verbal warning on July 8, 2017 and a written warning on July 28, 2017 for "Not answering emergency maintenance calls[,]" as opposed to two verbal warnings. Employer Exhibit 1. The termination notice was contradicted by the August 31, 2017 written warning, which stated claimant received verbal warnings on July 8 and 28, 2017 for not answering maintenance calls. Employer Exhibit 1. Finally, the August 21, 2017 written warning clearly stated claimant only had one verbal warning, on July 8, 2017, and this written warning did not mention any warnings for July 28, 2017 or July 29, 2017. Employer Exhibit 1. Although the warnings do not agree as to when warnings were given nor the type of warnings that were given, it is clear that the last allegation that claimant failed to answer a maintenance call occurred on August 19, 2017. Claimant was given a written warning on August 21, 2017 for that incident and claimant did not fail to answer maintenance calls after this incident and warning. Inasmuch as the employer had warned claimant about not answering maintenance calls on August 21, 2017 and there were no incidents of not answering maintenance calls thereafter, it has not met the burden of proof to establish that claimant acted deliberately or negligently after the most recent warning for not answering maintenance calls. The employer has not established a current or final act of not answering maintenance calls.

Ms. Scarff testified that claimant was discharged for absenteeism. The employer presented evidence that claimant was tardy on August 22 and 31, 2017. Claimant admitted he was tardy on August 22, 2017, but denies he was given a warning for this tardy. It is noted that the employer provided a documented verbal warning for claimant's tardy on August 22, 2017, but it was not signed by the employer until August 31, 2017, the day claimant was discharged. Employer Exhibit 1. Furthermore, claimant never signed the documented warning for the August 22, 2017 tardy. Employer Exhibit 1. Claimant also denied he was tardy on August 31, 2017. Claimant presented direct, first-hand testimony that he was at the employer on time on August 31, 2017. Even if it is determined that claimant tardy on August 22, 2017 and August 31, 2017, the employer has not established he had excessive unexcused absenteeism. Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two unexcused absences are not disqualifying since it does not meet the excessiveness standard; therefore, the employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility.

Finally, the employer indicated that claimant was also discharged for falsifying his timecard, specifically regarding his start time on August 22, 2017. Claimant credibly testified that he mistakenly switched his start times for August 22 and 23, 2017 on his timecard. Claimant further credibly testified that when he was informed of his mistake, he promptly went to the assistant manager and fixed his mistake. It is noted that the Ms. Scarff testified the employer still has claimant's timecards, but they were not presented as an exhibit for this hearing. The employer failed to rebut claimant's testimony that he mistakenly recorded his start times on his time card and he promptly fixed his mistake. Although claimant may have had multiple prior disciplinary warnings, the employer did not present any evidence that claimant "demonstrated a wrongful intent on his part." *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552 (Iowa Ct. App. 1986).

The employer has failed to meet its burden of proof in establishing disqualifying job misconduct. Benefits are allowed.

**DECISION:**

The September 25, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

________________________________
Jeremy Peterson
Administrative Law Judge

________________________
Decision Dated and Mailed

jp/rvs