IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

AMANDA R GRAPP Claimant **TARGET CORPORATION** Employer	**APPEAL NO. 19A-UI-00975-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/29/18** **Claimant: Appellant (2R)**

Iowa Code § 96.5-1 – Voluntary Quit

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 31, 2019, reference 06, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 18, 2019. Claimant participated. Employer participated by Sarah Hoyer, Kurt Sjolander, and Braden Yauk. Employer's Exhibits 1-2 were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant quit for good cause attributable to employer.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on January 11, 2019. On January 11, 2019 after her shift, claimant was told by employer that she was not in good standing with employer. This occurred after claimant had missed her three previous days of work before January 11, 2019 and 10 of her 53 days of work since her hire.

Employer stated that claimant's supervisor spoke with her on January 11, 2019. Employer asked claimant how she was feeling as she'd called in sick for her previous three days of work. Claimant stated that she was feeling much better. Employer then told claimant that she was not in good standing with employer because of all of her absences during the probationary period. At the time of the meeting, employer stated that although it was likely that claimant would be terminated for her excessive absenteeism during her probationary period, that the decision to terminate claimant wasn't made until January 12, 2019. Employer stated that claimant did not come into work on January 12, 2019 but instead called in sick. Employer further stated that claimant never called or showed for work after that day.

Claimant stated that during her days off of work, she called in every day to report that she was sick. Claimant stated that she did report to work on January 11, 2019 and did work her full shift. She said that after work employer told her that as claimant was on her probationary period and had missed so much work that she was no longer needed. Claimant stated that she did call

employer the next day to try and find out the information regarding her job separation. Claimant did not report following up on that call in any way.

Claimant missed 10 of her 53 scheduled work days while employed.

REASONING AND CONCLUSIONS OF LAW:

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).

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 Ct. 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*, 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. *State v. Holtz*, Id.

Initially it is determined that claimant contacted employer every day that she was going to be absent in accordance with company policies – this was admitted to by both parties. As her absences accumulated and claimant had not been employed for even three months, employer made a decision that they were not going to keep claimant employed. On January 11, 2019 claimant returned to work after missing a number of days. Employer testified that they told claimant that she was not in good standing with employer, but did not tell claimant she was being terminated. If this was the case, and employer was not approved to terminate claimant until the next day, then the administrative law judge does not understand what was the purpose of calling claimant into the office. There is no need to tell an employee that you're probably going to be terminated, and we'll tell you for sure tomorrow. Claimant, on the other hand, indicated that employer told her at the meeting that she was not needed any more. This is understandable given claimant's absence history. Claimant offered the more reasonable testimony surrounding the job separation, and it is seen that claimant was terminated and did not voluntarily quit.

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982), Iowa Code § 96.5-2-a.

In order to establish misconduct as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). The conduct must show a 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 the employee's duties and obligations to the employer. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Henry* supra. In contrast, 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 deemed misconduct within the meaning of the statute. Rule 871 IAC 24.32(1)a; *Huntoon* supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers,* 462 N.W.2d at 737. The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.,* 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.,* 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. 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 Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. The last incident, which brought about the discharge, fails to constitute misconduct because claimant's absences that led to her discharge were properly reported and therefore seen as excused. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

Claimant has not shown the ability to consistently attend work as a result of sicknesses. This matter will be remanded to the fact-finder to make a further determination as to whether claimant is able and available for work.

DECISION:

The decision of the representative dated January 31, 2019, reference 06, is reversed and remanded to the fact finder to make a determination as to whether claimant is able and available for work. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

bab/scn