IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

KEVIN TJADEN Claimant **CAPITAL LANDSCAPING LLC** Employer	**APPEAL 20A-UI-08561-J1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/12/20** **Claimant: APPELLANT (2)**

Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

On July 24, 2020, the claimant filed an appeal from the July 15, 2020, (reference 01) unemployment insurance decision that denied benefits based on No Call/No Show. The parties were properly notified about the hearing. A telephone hearing was originally scheduled for September 1, 2020. The telephone hearing was held on September 22, 2020. Claimant participated and was represented by attorney Lenard Bates. Claimant testified. Employer participated through attorney Brock Pohlmeier. Katarina Glaser Managing Partner and Phillip Glaser, Managing Partner testified for the employer. Claimant's Exhibits A – C were admitted into the record. Employer's Exhibits 1 – 5 were admitted into the record

ISSUES:

Did claimant voluntarily quit his employment with good cause attributable to the employment?
Was claimant terminated from employment for an unemployment insurance disqualifiable reason?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on August 19, 2019. Claimant last worked as a full time laborer. Claimant's last day at work was March 26, 2020. (EX. 4, p. 1) Claimant was separated from employment on April 7, 2020 when Ms. Glaser texted the claimant that he had not contacted her for a week and there was no job for him. (Ex. B, p. 2) The employer has a policy in a handbook, that was provided to claimant, which provides that "Employees who are absent for three consecutive days without notifying their departments will be presumed to have abandoned their position." (Ex. 1, p. 2) Ms. Glaser testified that if an employee is to miss work they are to contact her or their supervisor. The employee handbook states that employees are to contact their supervisor or department if they will be late or absent. (Ex. 1, p. 1) Claimant did not have prior warnings about excessive unexcused absences.

Ms. Glaser testified claimant was a No Call/No Show for five days- March 27, 30, 31 and April 1 and 2, 2020. Ms. Glaser testified that as of April 2, 2020 she considered claimant to have violated

company policy and had abandoned his job and was no longer an employee. On April 7, 2020 claimant sent Ms. Glaser a picture of medical records from an emergency room visit of April 6, 2020 and discharge on April 7, 2020. (Ex. B, p.1: Ex C pp. 1 – 9) Claimant also texted Ms. Glaser and said "I've been so sick this last week I just wasn't able to make it to work I had to be rushed to the er last night" (Ex. 8, p. 1) Ms. Glaser texted back that he no longer had a job. (Ex. B, p.1 and 2)

Claimant's supervisor was Danny Fees at Capital Landscaping LC (Capital). Mr. Fees was claimant's crew leader. On Monday March 30, 2020 claimant called Mr. Fees and told him he was sick and could not be at work. Mr. Fees received claimant's call. On March 31, 2020, claimant called Mr. Fees and informed him he was sick and could not work. On April 1, 2020 claimant texted Mr. Fees at 8:06 p.m. and apologized for missing work and said he would be at work tomorrow. (Ex. A, p. 1) Claimant's work shift started in the morning. On April 2, 2020 at 9:10 claimant texted Mr. Fees and asked him why he had not responded to his message. Claimant asked if he should come to work on April 3, 2020. Mr. Fees texted back there was no work on April 3, 2020. (Ex. A, pp. 1, 2). On April 5, 2020 claimant texted Mr. Fees and asked about work on Monday April 6, 2020. (Ex. A, p. 2)) Claimant did not get a response. On April 6, 2020 claimant sent a text to Mr. Fees that stated, "Brother I'm so sorry I couldn't make it I'm sick as fuck puking and shitting since last night" (Ex. A, p. 2) Claimant went to the emergency room the night of April 6, 2020 and was discharged the next day. Claimant returned to work instruction were return to work on April13, 2020 and that he should isolate for seven days, due to suspicion of possible COVID-19. (Ex. C, p. 9) Claimant testified that COVID-19 testing was not available to him at that time. Claimant provided the return to work information to Ms. Glaser on April 7, 2020 when he was told he no longer had a job.

REASONING AND CONCLUSIONS OF LAW:

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Emp't Appeal Bd*., 883 N.W.2d 179 (Iowa 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd*., 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd*., 492 N.W.2d 438, 440 (Iowa Ct. App. 1992).

Iowa Admin. Code r. 871-24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The employer has a three day No Call/No Show policy that was provided to claimant. I find that claimant did not violate the policy. The evidence shows at best that claimant did not call on

March 27, April 1 and 2, 2020. I find claimant either called or texted his supervisor regarding his illness on March 30, 31. He was told not to come to work on April 3, 2020. Claimant texted his supervisor about his illness on April 6, 2020 and provided the emergency room return to work information to Ms. Glaser on April 7, 2020. There was not three days of consecutive work that claimant was a No Call/No Show. I find that claimant did not voluntarily quit his employment.

The next issue is whether claimant committed job related misconduct.

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).
The employer has the burden to prove the claimant was discharged for job-related misconduct. *Cosper v. Iowa Dep't of Job Serv*., 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer made the correct decision in ending claimant's employment, 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). Misconduct justifying termination of an employee and misconduct warranting denial of unemployment insurance benefits are two different things. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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). When based on carelessness, the carelessness must actually indicate a “wrongful intent” to be disqualifying in nature. Id. Negligence is not 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).

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).

In order for a claimant's absences to constitute misconduct that would disqualify claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer’s policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee’s failure to provide a doctor’s note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

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 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.”

The claimant did not have a history of unexcused absences. Claimant was ill beginning on March 27, 2020 and ended up in the emergency room on April 6 and 7 2020. These absences are neither excessive or unexcused for unemployment purposes. The evidence in the record establishes a discharge for no disqualifying reason. The claimant did not commit job related misconduct.

DECISION:

Regular Unemployment Insurance Benefits Under State Law

The July 15, 2020, (reference 01) unemployment insurance decision is reversed. Benefits are payable, provided claimant is otherwise eligible.

James F. Elliott
Administrative Law Judge

September 24, 2020
Decision Dated and Mailed

j1/scn