IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DALE R WOODSMALL Claimant **TODD HACKETT CONSTRUCTION CO** Employer	**APPEAL 19A-UI-07874-S1-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/20/19** **Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Dale Woodsmall (claimant) appealed a representative's October 3, 2019 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Todd Hackett Construction (employer) for excessive unexcused absenteeism. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 29, 2019. The claimant participated personally. The employer participated by Jenna Hackett, Vice President, and Todd Hackett, President.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 15, 2016, as a full-time foreman working 7:00 a.m. to whenever the work was complete. He worked for the employer numerous times before. The employer had a handbook but did not offer it to the claimant. The employer wrote an attendance policy on January 27, 2017. At some point, the employer took the policy around to the job sites and had employees put their signatures on it. The claimant signed in early 2018. The employer did not give the claimant or the other employees a copy of the attendance policy.

The attendance policy stated that employees had to notify the employer one hour prior to the start of their shift if they were going to be absent from work. The policy also said the employer could terminate employees if they displayed a pattern of absenteeism. On December 28, 2017, the employer issued the claimant a written warning for absenteeism. The employer notified the claimant that he would receive a five-day suspension for further absences.

Once the president asked the claimant what was going on and why he did not come to work. The claimant told the president he did not come sometimes because he had been injured at work and two employees were doing all the work. The employer was working two guys into the ground and no employees were being hired. No warning was issued during the conversation.

On July 18, 2019, the claimant told the president his back was hurting and he could barely walk because of his work. The president did not complete a first report of injury. Due to his medical condition, the claimant overslept the following day. At approximately 9:30 a.m. the vice president and the project manager arrived at the claimant's house and woke the claimant. He told the two his knees and back hurt. The vice president took the employer's vehicle that was located at the claimant's residence and told him to call her father. The claimant called the president. The president was too busy to speak with the claimant. Later, the claimant discovered from a co-worker that he was fired. The employer terminated the claimant for attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for 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).
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.

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). 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). The employer did not provide sufficient evidence of job-related misconduct. It provided one date where the claimant did not appear for work in the year 2019. The claimant did not report his absence but he was not provided with the employer's attendance policy. One cannot expect an employee to follow a policy that the employee has not received. In addition, one incident of absenteeism is not excessive. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's October 3, 2019, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/scn