IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JODY L SIEBEL Claimant **CITY OF WALCOTT** Employer	**APPEAL NO. 17A-UI-05653-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/30/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated May 22, 2017, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 14, 2017. Claimant participated personally and was represented by attorney Kelsey Margquard and witness John Brockman. Employer participated by attorney Tom Schirman, and witnesses Paul Stagg, Tony Rupe and Shawn Winder. Employer's Exhibits 1-11 and 14 and Claimant's Exhibits A-H were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

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 February 14, 2017. Employer discharged claimant on May 2, 2017 because claimant allegedly committed multiple acts of misconduct. Employer stated that claimant was discharged for: (1) making allegations that her supervisor deleted important city files and records; (2) conducting personal business on the employer's computer; (3) displaying disrespect and indifference towards her responsibilities; (4) did not perform the required tests prior to filling out DNR forms thus leading to inaccurate or fabricated information; and (5) not keeping employer informed regarding claimant's intended return to work following taking time off for a shoulder surgery.

Claimant was not working the week between Christmas, 2016 and New Years 2017. When claimant came back to work on January 3, 2017 she discovered that there were a number of files and programs missing off of her computer. Claimant told employer that someone had altered her computer while she was off from work. The new Director of Public Works knew that only he and claimant had access to her computer, so the supervisor believed that claimant had specifically accused him of tampering with her computer and removing files.

When claimant was on her surgery leave, employer had a person with computer experience, but no specific computer certifications, look over the computer to determine whether files were

removed, and what files were in the computer. Said person determined that tens of thousands of files had been removed, but couldn't determine when the files had been removed, or when files had been added to the computer. The person did discover that claimant had accessed numerous sites and files used for crafting. Claimant and her witness (the former public works director) stated that claimant had accessed those files as a part of her work for the city when she was asked to create designs for shirts to be used to support the fire department. Employer further stated that no other city employee's computer's had been investigated to determine whether anyone else had any files on their computers not directly related to city business.

In 2015, up until the middle of 2016 claimant was tasked with taking water readings to test for chlorine and other chemicals. In early 2016 claimant's supervisor noticed that claimant's documentation of daily readings yielded results that were the same for weeks on end. Claimant had not done the readings since the middle of 2016. Claimant's new director of public works began his job in November of 2016. When he looked over the old document, which were available to the city at all times, he noticed the numbers of chlorine levels in the water that he believed couldn't have been correct that claimant had signed for as being correct.

Employee injured her shoulder at work and took time off from work after February 14, 2017 to have surgery on her shoulder and recover from said surgery. Claimant used acquired sick leave and vacation time to stay off of work until April 22, 2017. Employer stated that claimant had exhausted all of her time by that date. Claimant did not contact employer on or around that date to alert employer of the state of her recovery nor her expected return date. Claimant's supervisor had no contact with claimant while she was off from work. On May 1, 2017 claimant contacted the Mayor of Walcott by email to inform employer of where she stood medically and her expected return date. On May 2, 2017 claimant's supervisor informed claimant that she was being terminated from her employment as she hadn't shown back to work or timely informed employer of a request for extended time off.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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(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.

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 administrative law judge must examine each of the stated reasons for termination to determine whether any or all of them would disqualify claimant from the receipt of unemployment benefits.

Initially, claimant's "allegation" that employer deleted files, is not misconduct in and of itself. It was not proven that claimant made the allegation specifically against employer, but rather that the files had been removed. Employer deduced that since he was the only other person with access to the computer, claimant was accusing him. Claimant did not make such a direct accusation. This statement, in and of itself does not amount to an act of insubordination such that termination is appropriate. Employer did not say that files were not deleted, as tens of thousands of files had been deleted, but simply not during the time period when claimant was on vacation.

The administrative law judge next addresses the issues of personal business being conducted on city time and claimant's erroneously filling out DNR forms regarding water quality. Employer knew of the issues involving the DNR and reporting in June of 2016 at the latest. Employer continued to have claimant work, and employer did not state that claimant committed any additional violations of documents sent in after June of 2016. Regarding the use of the business city computer for personal use, employer knew of this information no later than March 24, 2017. Employer did not choose to make an accusation against claimant in this matter until May 2, 2017. Employee misconduct must be a current act in order to deny unemployment benefits. *Myers v. Iowa Dep't of Job Serv.*, 373 N.W.2d 507 (Iowa Ct. App. 1985). Employer discovered these acts ten and two months prior to employer choosing to act to terminate claimant for these acts. The acts were no longer "current" when employer chose to terminate claimant.

Additionally, employer made a choice in June, 2016 not to terminate claimant for the alleged misinformation contained in documents sent to the DNR regarding chlorine in the water. The administrative law judge will not, ten months later, decide that those actions amount to misconduct, when a decision had previously been made by employer that claimant would be able to continue with her job.

In regards to the personal business conducted on the computer, employer did not prove that claimant's actions were done for personal benefit, and not for the benefit of the city. Claimant's witness provided testimony that years ago she'd used the crafting information to make articles of clothing to be sold to benefit the fire department. Employer did not successfully refute this statement.

Employer did point out that it appeared that recently claimant had accessed a crafting. The person who determined this had no computer certification, but looked into computers as his business. The administrative law judge is not comfortable giving credence to the witness' statement without any assurances as to his level of knowledge.

At the time of claimant's taking of time off, there were no specific timeframes set when claimant was to return to work. There were no communications between claimant and employer for months while claimant was off work. On May 1, 2017 claimant emailed the mayor to alert him of her recovery. At that time, employer had not explored when claimant was returning to work. On May 2, 2017, the Director of Public Works contacted claimant to arrange a meeting. Employer

terminated claimant at that meeting saying that claimant's lack of communication amounted to absenteeism.

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. Here, employer gave claimant no warning, and issued no alert to claimant prior to her termination.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policies. Claimant was not warned concerning any of these policies.

The last incident, which brought about the discharge, fails to constitute misconduct because each of claimant's alleged misdeeds did not amount to misconduct. 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.

DECISION:

The decision of the representative dated May 22, 2017, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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