IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

KEOOUTHAY T THONGVANH Claimant **PRESTAGE FOODS OF IOWA LLC** Employer	**APPEAL NO. 21A-UI-18641-B2-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 06/06/21** **Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct
Iowa Code § 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 10**,** 2021, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 15, 2021. Claimant participated personally. Employer participated by Sarah Adams. Claimant's exhibit 1 was admitted into evidence.

ISSUES:

Whether claimant was discharged for misconduct?

Whether claimant is able and available for work?

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 September 2, 2020.

Employer discharged claimant on September 21, 2020 because claimant had not come to work in over three weeks and did not provide doctor's documentation to cover the extent of the absences.

Claimant was absent from work after September 2, 2021 as he had a interaction with a Covid positive person. Claimant received a doctor's note on September 4, 2020 stating that he should quarantine for 14 days. Pursuant to his doctor, claimant was to quarantine for 14 days. Claimant stated he then went to the doctor on September 17, 2020 and the doctor found him to be negative for Covid. Claimant tried to return to work.

Employer stated that as an essential business, claimant was to return to work immediately upon a negative Covid test and was to provide documentation for other days missed. Employer stated claimant did not come back to work until September 21, 2020, and when he came back

employer asked for the documentation. Employer said claimant was not terminated at that time (although he was not able to enter the main building as his ID had been turned off) and was only separated when he was a no call / no show for work for the next three days.

Claimant stated he was terminated on September 17 when he went to the office. Therefore, he had no reason/ability to get documentation to cover all of his days off from work when he was already told he had no job.

At all times since claimant filed an original claim in this matter, he was able and available for work.

REASONING AND CONCLUSIONS OF LAW:

Initially, this matter will not be examined as a voluntary quit, but will be looked at as a termination. The reason for this is that claimant showed he had documentation from a doctor prepared on September 4, 2020 that told claimant to be off from work until September 17, 2020. Claimant then went back to the doctor on September 17, got released to return to work because he was negative for Covid, and came back to work.

Employer's argument that claimant was just told to go get documentation, without other guidance to claimant about the necessity to continue calling into work as he was in limbo does not make sense. Employer's testimony indicated she gave claimant no time frame to return with the documents, but claimant needed to continue to call in every day until he produced documents excusing him for all of the days missed. Claimant, employer said, was not separated until claimant had not continued to call in on a daily basis while we was to get documentation. After 3 days, employer said claimant was terminated as a voluntary quit for not calling in on shifts he'd missed. Even if claimant did call in, he was not missing shfts because of illness; he was missing to get documentation. This reason would not be covered as an excuse. Under employer's argument, claimant was going to get points for missing work even if he brought back in the medical documentation.

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.
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> 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 Code section 96.4(3) provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
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> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

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.

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).

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. Here, claimant's testimony was far more coherent than employer's regarding the separation of the parties. This is not to say that each of claimant's dates were precise, as his meeting with employer may not have been the date he stated, but it is believed that claimant's job was already gone on the date he returned to work.

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. Claimant was not warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant attempted to stay in contact with employer surrounding both his quarantining and his negative Covid test. Employer decided claimant was being terminated as employer, being an essential business, requires claimant to return to work in contravention of a doctor's note telling him to quarantine for fourteen days after close contact with a person positive for Covid. 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 is also allowed benefits as he has remained able and available to work at all times since filing his original claim.

DECISION:

The decision of the representative dated August 10, 2021, 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

October 22, 2021
Decision Dated and Mailed

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