IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JORDAN A PRESCOTT Claimant **ALLSTEEL INC** Employer	**APPEAL NO. 19A-UI-07628-JTT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/01/19** **Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 19, 2019, reference 01, decision that allowed benefits to the claimant provided he met all other eligibility requirements and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on August 29, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on October 18, 2019. Claimant Jordan Prescott participated. Sandra Linsin of Employers Edge represented the employer and presented additional testimony through Lindsey Freebolin. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 9 into evidence. The administrative law judge took official notice of the materials submitted for and created in connection with the September 18, 2019 fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.
Whether the claimant was overpaid unemployment insurance benefits.
Whether the claimant must repay overpaid benefits.
Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jordan Prescott began his full-time employment with Allsteel, Inc. in 2016 and last performed work for the employer on Thursday, August 22, 2019. Toward the end of the employment, Mr. Prescott was promoted to the position of Production Team Lead/Assistant Manager. Mr. Prescott's usual work hours were 2:30 p.m. to 11:00 p.m., Monday through Friday. Mr. Prescott usually supervised nine employees. Matthew Rushford, Group Leader, was Mr. Prescott's immediate supervisor.

At the time Mr. Prescott last performed work for the employer on August 22, 2019, his relationship with Mr. Rushford was strained. Mr. Prescott was displeased with Mr. Rushford when he learned that Mr. Rushford was facilitating Mr. Prescott's subordinate's transition to a different shift. At the same time Mr. Prescott learned that he was about to lose a subordinate,

the subordinate also told Mr. Prescott that Mr. Rushford had said not to tell Mr. Prescott about the impending change. When Mr. Prescott confronted Mr. Rushford about the matter, Mr. Rushford told Mr. Prescott that he was not obligated to speak with Mr. Prescott about the matter. Mr. Prescott threatened to bid into a different job within the company. Mr. Rushford reminded Mr. Prescott that any prospective new supervisor would need to contact Mr. Rushford regarding Mr. Prescott's job performance. On August 22, 2019, Mr. Prescott spoke with Lindsey Freebolin, Member and Community Relations (MCR) Generalist, regarding the friction between him and Mr. Rushford. After that meeting, Ms. Freebolin was under the impression that the issue was resolved.

After Mr. Prescott worked his shift on August 22, 2019, he was next scheduled to work on Friday, August 23, 2019. At 2:29 p.m., one minute before the scheduled start of the shift, Mr. Prescott used his employer-issued cell phone to send a text message to Mr. Rushford stating that he would not be at work that day. Mr. Prescott's message to Mr. Rushford followed shortly after Mr. Rushford sent a text message to Mr. Prescott to let Mr. Prescott know that two of Mr. Prescott's subordinates had called in absences for that day. Mr. Prescott's message at 2:29 p.m. stated: "Man that's no good I'm not gonna be able to make it in today my dad's in the hospital I have to go to Peoria." Mr. Rushford promptly replied, "Oh man. I'm sorry to hear that. I'll connect with MCR to see if we can get some FMLA paperwork started for this." Mr. Prescott made no mention of how long he would be away from the employment or when he expected to return to the employment. Mr. Rushford made no statement approving the absence. Mr. Prescott had received word that day that his father had been hospitalized in connection with a crack cocaine overdose. Though Mr. Prescott was due at work at 2:30 p.m. and was right outside the workplace when he sent his 2:29 p.m. text message to Mr. Rushford, Mr. Prescott elected not to enter the workplace to discuss his need to be absent with Mr. Rushford or the employer's human resources personnel.

If Mr. Prescott needed to be absent from work, the employer's attendance policy required him to call Mr. Rushford or the absence reporting line prior to the scheduled start of his shift. If Mr. Rushford did not answer, Mr. Prescott was required to leave a voicemail message. In practice, Mr. Rushford also accepted notice in the form of a text message. Under the employer's leave and attendance policy, Mr. Prescott was required to provide notice each day of his absence unless and until the Member and Community Relations personnel advised him that the absence was covered under the Family and Medical Leave Act (FMLA) and excused him from making the daily contact. Mr. Prescott was familiar with the employer's attendance policy, including the absence reporting requirement. Mr. Prescott was responsible for enforcing the attendance policy in the context of supervising his subordinates. The employer had a work rule applicable to non-supervisory employees that deemed no-call, no-show absences a voluntary quit. However, the employer asserts that particular work rule no longer applied to Mr. Prescott once Mr. Prescott was promoted to a supervisory position.

Mr. Prescott traveled to Peoria on August 23, 2019. Mr. Prescott elected to leave his work phone at home in Muscatine. This hindered the employer's ability to communicate with Mr. Prescott regarding his absence from work and return to work.

Mr. Prescott's father was in the hospital when Mr. Prescott arrived in Peoria. Mr. Prescott's father remained in the hospital until 3:00 p.m. on August 24, 2019, when he was discharged to home. Though Mr. Prescott's father's doctor had not advised or requested that Mr. Prescott assist with the father's care, Mr. Prescott elected to stay with his father.

Mr. Prescott was next scheduled to work on August 26, 27, 28 and 29, 2019, Monday through Thursday, but was absent from work each day without providing appropriate notice to the employer. When Mr. Prescott did not appear for his shift on August 26, Mr. Rushford sent a text message to Mr. Prescott's work cell phone at 2:44 p.m. in which he asked, "Everything ok with you?" Mr. Prescott did not have the work phone with him, did not receive the message, and did

not respond to the message. At 3:01 p.m. on August 26, Mr. Rushford sent an email message to Ms. Freebolin. Mr. Rushford wrote in the email message that Mr. Prescott had been a no-call/no-show that day. Mr. Rushford added that he had checked the vacation calendar and that Mr. Prescott was not on the vacation calendar. On August 26, Lindsey Freebolin, MCR Generalist, attempted to reach Mr. Prescott by telephone at Mr. Prescott's work cell phone number. When that did not work, Ms. Freebolin contacted Mr. Prescott's emergency contact person. Mr. Prescott's mother is his emergency contact person. Ms. Freebolin spoke with Mr. Prescott's mother regarding her attempt to contact Mr. Prescott regarding his absence from the employment. Mr. Prescott's mother agreed to forward the message to Mr. Prescott.

When Mr. Prescott was again absent without notice on Tuesday, August 27, 2019, Ms. Freebolin attempted to reach Mr. Prescott at his personal cell phone number. Mr. Prescott did not answer. The phone was not set up to receive voicemail messages, so Ms. Freebolin was unable to leave a voicemail message. Ms. Freeboilin then called Mr. Prescott's mother's phone and left a voicemail message. Neither Mr. Prescott nor his mother responded to the message.

When Mr. Prescott was again absent without notice on Wednesday, August 28, Mr. Rushford sent a text message to Mr. Prescott's personal cell phone number at 2:35 p.m. Mr. Rushford wrote, "Is everything ok with you? Please call me." Mr. Prescott received the message and replied by text, "I will not be able to make it in today sorry for the inconvenience." Mr. Rushford promptly replied, "You need to get in contact with MCR today or it will impact your employment." Mr. Prescott did not respond to the message. Mr. Prescott did not contact the MCR personnel.

When Mr. Prescott was again absent without notice to the employer on August 29, 2019, Ms. Freebolin tried at 10:00 a.m. to reach Mr. Prescott at his personal cell phone number, but Mr. Prescott did not answer. Ms. Freebolin then concluded that Mr. Prescott had abandoned the employment. On August 29, Ms. Freebolin mailed a letter to Mr. Prescott to memorialize the separation from the employment. The letter began as follows: "You have recently informed us that you are voluntarily terminated your employment with the company. Below is a summary of your member benefits." The letter continued with information concerning health care coverage and tax-deferred spending accounts. Ms. Freebolin included her contact information, including her telephone number in the letter.

Mr. Prescott was still in Peoria on August 30, when his uncle contacted him to let him know a letter from the employer had arrived. Mr. Prescott had his uncle read to him that portion of the letter that stated Mr. Prescott had voluntarily quit. Mr. Prescott had his uncle take a photo of the letter and forward the photo to Mr. Prescott's personal cell phone. Mr. Prescott elected not to call Mr. Rushford at the number now stored on his personal cell phone and his work cell phone. Mr. Prescott elected not to call Ms. Freebolin at the number she had provided on the August 29 letter or the number now stored on his personal cell phone and his work cell phone. Upon receipt of the letter that stated the employer deemed the employment done, Mr. Prescott decided his father no longer needed his assistance.

On the afternoon of August 30, Mr. Prescott returned to Muscatine. At 4:00 p.m. on August 30, Mr. Prescott went to the workplace and attempted to enter the secured facility. Mr. Prescott's ID badge had been deactivated. Mr. Prescott was unable to use the ID badge to enter the workplace. Mr. Prescott went home to get Ms. Freebolin's August 29 letter. Mr. Prescott elected not to call the number Ms. Freebolin had included on the letter as her contact number. Mr. Prescott elected not to call Mr. Rushford or Ms. Freebolin at the numbers that were now stored on his personal cell phone and his work cell phone. Mr. Prescott elected not to make further contact with the employer.

Mr. Prescott established an original claim for benefits that was effective September 1, 2019. This employer is the sole base period employer. Mr. Prescott received $4,329.00 in benefits for nine weeks between September 1, 2019 and November 2, 2019.

On September 18, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Prescott's separation from the employment. Mr. Prescott participated in the fact-finding interview call and provided a statement that was intentionally misleading. Mr. Prescott told the deputy that he had sent a text message to Mr. Rushford every day to keep him updated. That statement was false. Mr. Prescott told the deputy that Mr. Rushford had told him that his absences were covered as part of a leave of absence until he was able to return. That statement was false. Mr. Prescott told the deputy that he had a text message from Mr. Rushford saying that his absence was covered. That statement was false. Mr. Prescott made other intentionally misleading statements to the deputy.

The employer received appropriate notice of the fact-finding interview, but neither the employer nor the employer's third-party representative participated in the fact-finding interview. The only information the deputy had from the employer was a cursory, boilerplate narrative contained in the protest submitted via SIDES and repeated in an attached letter from Employers Edge.

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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

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. *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. *Id.*

Significant portions of Mr. Prescott's testimony are not credible, which calls into question whether other portions of Mr. Prescott's testimony are credible. Mr. Prescott's assertion that Mr. Rushford told him by telephone call August 23, 2019 that his absences were covered by FMLA and approved. The fact that Mr. Rushford documented a no-call/no-show absence for the very next work day and attempted to make contact with Mr. Prescott on the next work day and subsequent work days regarding the continued absence refutes Mr. Prescott's assertion. Mr. Prescott's assertion that he did not know he had to report his absences on a daily basis and that he did not know he had to follow up with Member and Community Relations personnel regarding FMLA is not credible. Mr. Prescott had been in the employment for three and a half years, long enough to become familiar with the employer attendance and leave policies. In addition, Mr. Prescott was in a supervisory position and charged with assisting in enforcing the employer's attendance policies. Mr. Prescott's assertion that he did not know how to get in contact with the employer while he was absent was not credible. Mr. Prescott's assertion that he did not know how to get in contact with the employer in connection with his August 30 trip to the workplace is not credible. At all relevant times, Mr. Prescott had readily available means to contact the employer as needed through the phone numbers stored in his personal cell phone and his work cell phone. Mr. Prescott took affirmative steps to make it more difficult for the employer to get with him regarding work matters during the extended absence. With one exception, the employer's testimony did not include such credibility issues. That one exception was the employer's assertion that the employer did not know about the September 18, 2019 fact-finding interview. Ms. Linsin's testimony refuted that assertion.

The evidence in the record establishes a discharge that was based on excessive unexcused absences. The four consecutive no-call/no-show absences on August 26-29, 2019, were each

an unexcused absence under the applicable law. The administrative law judge notes that the August 28, 2019 contact was initiated by the employer, not by Mr. Prescott. Mr. Prescott's four consecutive unexcused absences were excessive, demonstrated an intentional and substantial disregard for the employer's interests, and constituted misconduct in connection with the employment. Accordingly, Mr. Prescott is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Prescott must meet all other eligibility requirements.

The administrative law judge has considered, in the alternative, whether Mr. Prescott's separation from the employment might be deemed a voluntary quit with or without good cause attributable to the employer.

Iowa Code section 96.5(1)(c) provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

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.

If the separation is viewed in the alternative as a voluntary quit, said quit would be without good cause attributable to the employer. Mr. Prescott never made contact with the employer and never offered his services following the extended absence. Despite the lack of a no-call/no-show abandonment work rule applicable to Mr. Prescott, Mr. Prescott's four-day absence without notice to the employer was sufficient to lead the employer to reasonably conclude that Mr. Prescott have voluntarily quit the employment. Mr. Prescott's personality conflict with the supervisor and dissatisfaction with the work environment would not provide good cause for the quit. See Iowa Administrative Code rule 871-24.25(21) and (22).

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met:

(1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Prescott received $4,329.00 in benefits for the nine weeks between September 1, 2019 and November 2, 2019, but this decision disqualifies him for those benefits. The benefits Mr. Prescott received constitute an overpayment of benefits. The employer failed to participate in the fact-finding interview. However, Mr. Prescott's statement to the deputy at the time of the fact-finding interview included multiple intentionally misleading statements. For that reason, Mr. Prescott is required to repay the overpaid benefits and the employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

DECISION:

The September 19, 2019, reference 01, decision is reversed. The claimant was discharged on August 29, 2019 for misconduct in connection with the employment based on excessive unexcused absences. In the alternative, the administrative law judge concludes the claimant voluntarily quit without good cause attributable to the employer. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid $4,329.00 in benefits for the nine weeks between September 1, 2019 and November 2, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid to the claimant.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

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