IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

BECKY L VALDEZ Claimant **JEWELL MACHINE & FABRICATION** Employer	**APPEAL NO. 19A-UI-01223-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/13/19** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated February 5, 2019, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 1, 2019. Claimant participated personally and with attorney John Singer. Employer participated by attorney Wendy Meyer and witnesses Adam Berntgen and Stacy Dixon. Employer's Exhibits 1-7 and Claimant's Exhibit A 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 January 4, 2019. Employer discharged claimant on January 8, 2019 because claimant violated employer's attendance policies after repeated warnings.

Claimant was hired on July 30, 2018 to work as a full-time machine operator. On December 11, 2018 employer issued claimant two written warnings. Both were attendance-based. By December 11 claimant missed or was tardy for work on 18 occasions. After the warning, claimant missed additional days not following the company guidelines to alert employer. On December 19, 2018 claimant was suspended for three days for attendance issues. On June 7, 2018 claimant called to say that she would be late for work, but never showed. Claimant was terminated for this last, most recent action on January 8, 2019.

Claimant went to a co-worker sometime in November to share information regarding inappropriate sharing of pornographic material by a supervisor from another area. Claimant did not mention this to anyone for a number of weeks before going to the co-worker. Claimant mistakenly thought that this business development representative was a member of human resources as she'd been involved in the initial training of hires'.

On November 29, 2018, claimant made employer aware of issues she was having with the supervisor. Claimant did not share the details with employer. On December 11, 2018, claimant mentioned to the same co-worker that she was uncomfortable with the pornographic images previously shown to her. The co-worker went to human resources with this information. Claimant sat down on that date and shared the information. She stated that the co-worker in question gave claimant, "dirty looks when I walk by." She stated that other people treated her coldly. At this meeting claimant was asked if she wanted to change to a position on a different shift. Claimant did not pursue this option. Claimant did sign off on a document prepared to show claimant's concerns. Said document did not specifically mention the sharing of pornographic images, but did refer to them through another co-worker's comments. (Cl. Ex. A). At the same meeting where claimant shared her complaints, she was given the warnings for attendance. These documents were created prior to the meeting.

Claimant stated that her absences occurred as a result of her being uncomfortable with the supervisor who'd shared these images.

Employer stated that they did an investigation into claimant's assertions and did not find that there had been violations. They interviewed multiple witnesses in the area and they did not validate claimant's assertions.

Claimant stated that multiple other people had also quit because of the co-worker showing pornography.

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).

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.

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 claimant continued to have absences in violation of company policy after repeated warnings.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism and tardiness. Claimant was warned concerning this policy. The last incident, which brought about the discharge, constitutes misconduct because claimant did not come into work at all after notifying employer she would be late on January 7, 2019. In spite of numerous warnings, claimant would not follow employer's attendance policies. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

Claimant has attempted to tie in her absences and tardiness to a co-worker showing her pornographic images. This argument fails on multiple accounts. Initially, claimant has not proven that these events occurred as the only testimony indicating the improper actions was that of claimant. Employer's investigation did not find anyone who supported claimant's claims. Additionally, even if the evidence supported claimant's assertions, it is difficult to see how claimant's attendance is tied in with the receipt of the pictures. Claimant's absenteeism started soon after she was hired and continued on a consistent basis throughout her tenure. There is no particular spite in absenteeism around any alleged dates of an occurrence. (Claimant's only spike in absenteeism occurred soon after the first tow written warnings – well over a month after any alleged incidents). As such, this matter cannot be looked at as a quit by the claimant for good cause that is attributable to employer. Benefits are denied.

DECISION:

The decision of the representative dated February 5, 2019, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Blair A. Bennett
Administrative Law Judge

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Decision Dated and Mailed

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