IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DAVID W DYER Claimant **ABRH LLC** Employer	**APPEAL 15A-UI-10614-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 08/23/15** **Claimant: Appellant (2-R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the September 16, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 6, 2015. Claimant participated personally and through Attorney Randy Schueller. Employer participated through operations director, Mike Halepis and hearing representative Marlene Sartin.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a supervisor from November 13, 2014, and was separated from employment on August 10, 2015, when he was discharged.

The employer has an attendance policy that requires employees to call two hours prior to their shift if they are going to miss their shift. Claimant had several prior warnings and documentations regarding attendance and performance. The employer discharged claimant on August 10, 2015, because claimant was going to be incarcerated for an unspecified amount of time.

Claimant last worked for the employer on July 27, 2015. In June 2015, claimant suffered an injury at work. A few days prior to July 27, 2015, claimant went to a doctor regarding the injury. The doctor put claimant on a work restriction that he could not lift more than ten pounds. Claimant provided a doctor's note containing the work restriction to the employer. The employer told claimant that there was no work available for him because he needed to be able to lift more than ten pounds. The employer then took claimant off the work schedule after July 27, 2015.

On August 10, 2015, claimant was incarcerated. Claimant never had a conversation with the employer regarding his incarceration. Claimant contacted his employer after he was released on August 24, 2015. The employer told claimant he was no longer an employee.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

When the record is composed of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

The decision in this case rests, at least in part, upon the credibility of the parties. It is the duty of an administrative law judge and 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, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa 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*, 548 N.W.2d 162, 163 (Iowa App. 1996). 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 evidence you believe; whether a witness has made inconsistent statements; the witness's 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*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The first issue is whether claimant quit or was discharged from employment. Claimant was taken off the schedule by the general manager after July 27, 2015 because of his work restriction. The employer then determined that claimant was separated from employment on August 10, 2015. Claimant did not tell the employer he quit or abandoned his job. Claimant did not report to work after July 27, 2015, because he was not on the schedule. Therefore, claimant was discharged. The next issue is whether claimant's discharge was for a disqualifying reason.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation.

Iowa Code § 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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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 Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and the 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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). 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 Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Where an employee did not voluntarily quit but was terminated while absent under medical care, the employee is allowed benefits and is not required to return to the employer and offer services pursuant to the subsection d exception of Iowa Code § 96.5(1). *Prairie Ridge Addiction Treatment Servs. v. Jackson and Emp't Appeal Bd*., 810 N.W.2d 532 (Iowa Ct. App. 2012).

Claimant was injured on the job in June 2015. Both parties agreed that claimant was placed on work restrictions while he was still employed, thus the employer was aware of his injury. Claimant provided direct testimony that he was on work restrictions when he was taken off the schedule on July 27, 2015. The employer presented no direct evidence to rebut claimant's testimony. The employer's argument that claimant abandoned his job when he did not show up for his shifts after July 27, 2015 and he was not on work restrictions at this time is not persuasive. The employer was not able to give exact dates claimant was scheduled to work after July 27, 2015; whereas claimant provided direct testimony that there were no dates, because he was taken off the schedule after July 27, 2015 by the general manager because there was no work available due to his work restriction. Furthermore, the claimant's testimony that he was on work restriction is also strengthened by the date of separation. The employer testified claimant was separated on August 10, 2015 when he failed to show up for his shifts. The employer testified claimant told the employer a couple of days after July 27, 2015, that he was going to be incarcerated for an undetermined amount of time and so the employer gave him until August 10, 2015 to show up for work. This argument is not persuasive. Claimant testified he never contacted the employer about his incarceration until he was released. This is corroborated by claimant's testimony that his incarceration on August 10, 2015 was unplanned, therefore, he could not have told the employer before August 10, 2015 that he was going to be incarcerated.

The employer terminated claimant from employment on August 10, 2015 while claimant was under work restriction. Since claimant had not yet been released to return to work without restriction as of the date of separation and the employer told claimant there was no work available because of his work restriction, no disqualifying reason for the separation has been established. Benefits are allowed, provided claimant is otherwise eligible.

An issue remains as to whether claimant is able and available to work and when he became able and available to work.

DECISION:

The September 16, 2015, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid. This matter is remanded for a determination on the issue of whether claimant is able and available for work.

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Jeremy Peterson
Administrative Law Judge

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Decision Dated and Mailed

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