IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JEFFERY T MOORE Claimant **CIVCO MEDICAL SOLUTIONS** Employer	**APPEAL NO. 18A-UI-08764-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/29/18** **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 August 16, 2018, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 7, 2018. Claimant participated. Employer participated by Macey Griner. Employer's Exhibits 1-3 and 5-14 were admitted into evidence.

ISSUE:

Whether claimant quit for good cause attributable to employer?

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 March 20, 2018. Claimant did not show up for his job on June 27, 2018, the date his doctor stated that claimant was to return to work after being off work for an extended period of time. When claimant didn't show and didn't return employer's calls, employer terminated claimant.

Claimant was injured outside of work on or around March 20, 2018. Claimant was placed on disability and allowed to recover for a period of time. On June 13, 2018, claimant's physician prepared a return to work form indicating that claimant was to return to work on June 27, 2018, with a 25 pound weight restriction and no repetitive lifting. Employer stated that they attempted to call claimant prior to claimant's return to work on numerous occasions, and that claimant didn't return any of the phone calls. Employer stated that they'd left multiple messages to have calls returned to discuss the job availability that would be within claimant's work restrictions. After not having messages returned, claimant did not return the calls and did not return to work on June 27, 2018, employer terminated claimant for job abandonment. Employer sent claimant a registered letter explaining the termination on June 28. Said letter was signed for on June 28, 2018. Employer received a first call from claimant on July 20, 2018. As claimant was confused regarding the termination, employer advised claimant to refer to the termination letter he'd

received a month earlier. (Emp. Ex. 6). Employer produced the documentation of each letter, and also included contemporaneous emails sent from human resources to other members of management concerning claimant's lack of response to employer's attempts to reach him.

Claimant stated that employer spoke with him prior to his proposed return date. Claimant reported that on this call of June 25, 2018, he was told by employer that there was no work available for claimant when he was to return. Claimant gave contradictory statements as to his receipt of the June 25, 2018 letter from employer detailing his return to work, saying he never received the letter and also that he received it weeks later along with his receipt discharge letter. Claimant also didn't acknowledge signing for the termination document stating that he was being terminated for his lack of return to work. Claimant stated that he had not received the termination notice from employer by July 5, 2018, when claimant's doctor stated claimant was to be at work without any restrictions. (Cl. Ex. 2). Claimant did not return to work on that date, did not call employer to tell of his lack of return, and did not get an additional doctor's report changing when claimant was to return to work.

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.

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. In this matter claimant contradicted himself and could not state dates of contact that he had with employer. Whereas employer forwarded to the administrative law judge texts sent at the time of the various attempts to contact claimant, claimant relied only on his memory, and claimant testimony on multiple matters changed through the hearing. The administrative law judge finds employer's testimony and documents as controlling in this matter.

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.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning job abandonment. The last incident, which brought about the discharge, constitutes misconduct because claimant knew he was to return to work on June 27, but did not do so. Claimant did not do so, nor did he return employer's calls or call in to report his on-going absence. 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.

DECISION:

The decision of the representative dated August 16, 2018, 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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