IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

JOSEPH A OLINE Claimant **AEROTEK INC** Employer	**APPEAL NO. 18R-UI-10362-B2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/15/17** **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 27, 2018, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 31, 2018. Claimant participated. Employer did not answer the phone when called at the number registered for the hearing did not participate.

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: As claimant was the only participant in the hearing, all findings of fact are derived from claimant's testimony. Claimant last worked for employer on July 27, 2018. Claimant was terminated by employer on August 6, 2018. Claimant was injured, and it was unknown whether it was a workplace injury or not. Claimant woke up on July 10, 2018 and his groin area was very sore. Claimant went to the doctor, and the doctor produced a note excusing claimant from work on July 10 and 11, with a return to work date of July 12, 2018. Claimant took this note to Bishop Industries – the business where Aerotek had placed him – on July 10, after his doctor's appointment and spoke with Peter Wagner. Claimant stated that the Bishop representative saw the doctor's note and told claimant that he could be off of work all of that week, and all of the next week as he knew that these injuries took a long time to heal.

Claimant stated that he did not report his injury to his employer (Aerotek) because in the past when he had called and left messages for Austin – his agent – Austin would never return the calls. Claimant assumed that as long as he was calling Bishop that he was in sufficient contact.

Claimant stated he did not visit the doctor at all during the week of July 16, 2018 as the contact at Bishop had kept him off work. (Claimant repeatedly stated that he had a doctor's excuse for those dates, but this contradicted claimant's testimony that he didn't visit the doctor between July 10 and July 23.) Claimant visited the doctor again on July 23, 2018 and the doctor wrote that claimant could return to work on July 25, 2018 for light duty work.

Claimant worked on July 25 through July 27. Claimant did not return to work after that date and did not forward to either employer any additional doctor's notes extending his days off from work. Employer called claimant on August 6, 2018 and told claimant he would be no longer employed as he'd been a no-call/no-show from work for three days.

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 was not a consistent, reliable witness as to facts. Claimant kept stating that his visit to the doctor on July 10, 2018 allowed him to be off work until the next week when the document was read into the record stating that claimant was to return to work on July 12, 2018 – a Thursday. Claimant additionally stated that his boss had allowed claimant off of work not simply the week of July 10, 2018, but also told him to be off of work the next week. When claimant went to the doctor on July 23, 2018, the doctor wrote a document stating claimant was to do light duty, half day work on July 25 through July 27, 2018. Claimant didn't work July 23 or 24, 2018 but didn't explain why. Claimant additionally didn't explain why he did not get any further excuse after the doctor's note from July 23, 2018. Claimant did miss work from this date until his termination on August 6, 2018.

Claimant's testimony regarding contacting Aerotek is also at odds with itself. Whereas claimant stated that he told payroll that he was off of work for the weeks ending July 13, 2018 and July 20, 2018, he stated that he didn't daily call because he'd not had his previous calls returned. Certainly claimant could have made a daily call to payroll to report in, but he chose not to do so.

Claimant offered no explanation for his failure to be in contact with employer after July 27, 2018.

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 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 absenteeism. The last incident, which brought about the discharge, constitutes misconduct because claimant did not offer a valid explanation why he did not call employer – especially after July 27, 2018. 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 27, 2018, reference 02, 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

bab/scn