IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SCOTT MCCART Claimant **VANDER HAAGS INC.** Employer	**APPEAL 20A-UI-06346-BH-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/22/20** **Claimant: Appellant (2)**

Iowa Code section 96.5(1) – Voluntary Quit
Iowa Administrative Code rule 871-24.25 – Voluntary Quit Without Good Cause
Iowa Code section 96.5(2)(*a*) – Discharge for Misconduct
Iowa Administrative Code rule 871-24.32(1)(*a*) – Discharge for Misconduct

STATEMENT OF THE CASE:

Scott McCart appealed the June 10, 2020 (reference 03) unemployment insurance decision that denied benefits. The agency properly notified the parties of the hearing. The undersigned presided over a telephone hearing on July 21, 2020. McCart participated personally and tesitifed. Vander Haags Inc. (Vander Haags) participated through Colin Hubka, general manager at the company's Council Bluffs location.

ISSUE:

Was McCart's separation from employment with Vander Haags a layoff, discharge for misconduct, or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the undersigned finds the following facts.

Vander Haags hired McCart on August 13, 2018. He worked full time as a shipping and receiving technician at the company's facility in Council Bluffs, Iowa. Hubka was MCart's immediate supervisor. McCart last performed work for Vander Haags on March 16, 2020. On March 27, 2020, Vander Haags discharged McCart.

Before March of 2020, Vander Haags had not disciplined McCart for absenteeism or any absences without notifying the employer. McCart fell ill the week of March 16, 2020. He had a fever and respiratory symptoms. McCart was unable to physically visit his doctor's office because of COVID-19. But McCart was able to speak to his doctor, who advised him to quarantine because his symptoms and indicated he might have COVID-19.

The owner of Vander Haags sent out an email regarding the COVID-19 pandemic. In the email, the owner informed employees that they were to remain home if they had symptoms of illness. McCart communicated with Hubka regarding his illness during the week of March 16. He even sent him a picture message showing the high temperature he had due to his illness.

McCart had an outstanding arrest warrant. He had to serve time in jail because of it. McCart decided to report to jail to serve his time while he was on leave for his illness. On March 23, McCart informed Hubka that he had to go to jail regarding an outstanding arrest warrant on March 24. McCart spent a day in jail.

McCart got out of jail. He did not contact Hubka or anyone else at Vander Haags on March 25 or March 26, even though he was still feeling ill. Hubka did not attempt to communicate with McCart directly. Instead, Hubka contacted the sheriff for the county in which McCart resided to see if he could talk to McCart, but had no luck.

On March 27, McCart contacted Hubka to see if he could return to work because the symptoms of his illness had resolved. Hubka said McCart could not return to work because he had voluntarily quit employment with Vander Haags under a company policy stating an employee is deemed to have voluntarily quit employment with the company if the employee does not come to work for three consecutive days without notifying Vander Haags of the absences.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Vander Haags discharged McCart from employment for no disqualifying reason.

First, Iowa Code section 96.5(11) is not implicated because McCart gave advance notice that he would be jailed for a day while on a medical leave of absence and Vander Haags approved of him doing so. Put otherwise, McCart's incarceration did not result in an absence that caused McCart's separation from employment with Vander Haags.

Iowa Code section 96.5(1) disqualifies a claimant from benefits if the claimant voluntarily leaves employment without good cause attributable to the employer. Under Iowa Administrative Code rule 871-24.25(4), it is presumed a claimant voluntarily left employment without good cause attributable to the employer if the claimant "was absent for three days without giving notice to employer in violation of company rule."

McCart's last day worked was March 16. He missed work after that because he was ill. His symptoms included a fever and respiratory issues. McCart was unable to see his doctor in person. But his doctor advised him to quarantine due to his symptoms, which were indicative of COVID-19. McCart contacted Hubka multiple times regarding his illness and absences.

McCart contacted Hubka by text message on March 23 and informed him that he would be serving jail time due to an outstanding arrest warrant on March 24. McCart was released the same day he went in to serve the warrant.

McCart did not return to work on March 25 or 26 because he did not feel well. He was still experiencing symptoms indicative of COVID-19, though he was never tested because his doctor's office did not see him in person. In accordance with the owner's email, he stayed home. McCart did not contact Vander Haags regarding his absences on March 25 or March 26. He thus tallied two absences without giving notice to the employer, in violation of a known company policy.

McCart called in on March 27 and asked if he could return to work. March 27 was the third day, meaning that McCart was not absent for three days without giving notice to Vander Haags, even though Vander Haags interpreted its policy as having been violated. According to Vander Haags, McCart quit under its policy even though Vander Haags ended the employment relationship.

Vander Haags is free to interpret and apply its internal policies as it sees fit. However, an employer's interpretation of its work rules is not controlling on the agency. The question is whether Iowa Administrative Code rule 871.24.25(3) is interpreted the same way as Vander Haags interprets its work rule regarding three absences without notice.

Iowa Code section 96.2 states:

> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and the worker's family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

The Iowa Supreme Court has held that this statutory provision requires the Iowa Employment Security Law to be interpreted "'liberally to carry out its humane and beneficial purpose.'" *Sladek v. Emp't Appeal Bd.*, 939 N.W.2d 632, 637 (Iowa 2020) (quoting *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997)). Based on Iowa Code section 96.2 and longstanding Iowa Supreme Court precedent, rule 871-24.25(3) must be construed liberally to carry out the statute's humane and beneficial purpose.

Here, McCart contacted his immediate supervisor on the third day of the three days that constituted absences without notice under Vander Haags interpretation of its policy. However, McCart's communication on the third day prevents rule 871-24.25(3) from applying to this case. Under the text of the rule, an employee must go three days without giving notice, not two and a half or two and three-quarters. Without three full days without notice passing, a claimant cannot be found to have voluntarily left employment under rule 871-24.25(3). McCart's actions do not constitute voluntarily leaving employment under Iowa Code section 96.5(1) and rule 871-24.25(3).

Because McCart did not voluntarily leave employment under the law, Vander Haags discharged him. Under Iowa Code section 96.5(2)(*a*), an individual is disqualified for benefits if the employer discharges the individual for misconduct in connection with the individual's employment. The statute does not define "misconduct." But Iowa Administrative Code rule 871-24.32(1)(*a*) does:

> "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.

The Iowa Supreme Court has ruled this definition accurately reflects the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Vander Haags decided to end its employment relationship with McCart under its policy regarding three absences without notice. However, it is more likely than not that McCart gave Vander Haags notice of his March 24 absence on March 23 and requested to return to work on March 27. Thus, he had two days of absences due to illness without notice to Vander Haags. And Vander Haags ended his employment due to the absences.

Iowa Administrative Code rule 871-24.32(7) provides:

> Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Iowa Administrative Code rule 871-24.32(8) states

> While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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).

Excessive absences are not considered misconduct unless unexcused. The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be

excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10.

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*, 321 N.W.2d at 9; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *See Gaborit*, 734 N.W.2d at 555-558. An employer's no-fault absenteeism policy or point system is not dispositive of the issue of qualification for unemployment insurance benefits. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, 350 N.W.2d at 191. When claimant does not provide an excuse for an absence the absences is deemed unexcused. *Id*.; *see also Spragg v. Becker-Underwood, Inc.*, 672 N.W.2d 333, 2003 WL 22339237 (Iowa App. 2003).

Excessive absenteeism has been found when there have been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *See Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982).

Vander Hags discharged McCart due to these absences. The absences were due to illness; however, they were unexcused because McCart did not report them to Vander Haags. Two unexcused absences, especially when they are due to illness with symptoms suggestive of COVID-19 in the middle of an outbreak, are not excessive under section 96.5(2)(*a*). McCart is therefore entitled to regular unemployment insurance benefits under state law, provided he is otherwise eligible, beginning on March 27, 2020, the first day he was able to and available for work after his illness.

DECISION:

The June 10, 2020 (reference 03) unemployment insurance decision is reversed. McCart did not voluntarily leave employment under section 96.5(1); rather, Vander Haags discharged McCart from employment for no disqualifying reason. Benefits are allowed, provided McCart is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Ben Humphrey
Administrative Law Judge

August 28, 2020
Decision Dated and Mailed

bh/scn