

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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**TINA M OLSON**  
Claimant

**MIDLAND NATIONAL LIFE INC CO**  
Employer

**APPEAL NO. 20A-UI-02100-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/02/20**  
**Claimant: Appellant (1/R)**

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Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Tina Olson filed a timely appeal from the February 25, 2020, reference 01, decision that disqualified her for benefits and that relieved the employer's account of liability for benefits, based on the deputy's conclusion that Ms. Olson was discharged on January 29, 2020 for excessive unexcused absences. After due notice was issued, a hearing was held on April 22, 2020. Ms. Olson participated. Kristin Percival represented the employer and presented additional testimony through Cassie Miller. Exhibits A, D and E were received into evidence. Ms. Olson declined to waive formal notice on the questions of whether she had been overpaid state unemployment insurance benefits and Federal Pandemic Unemployment Compensation (FPUC).

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Tina Olson was employed by Midland National Life Insurance Company as a full-time Senior Quality Control Specialist until January 29, 2020, when Kristin Percival, Human Resources Consultant, discharged from the employment for attendance. Ms. Olson began her employment in 2003. Prior to January 7, 2020, Ms. Olson's work hours were 8:00 a.m. to 5:30 p.m., Monday through Thursday, and 8:00 to 12:30 p.m. on Friday. Effective January 7, 2020, the employer amended Ms. Olson's start time by agreement with Ms. Olson to 8:15 a.m., to make it easier for her to get to work on time. The adjustment included a corresponding 15-minute adjustment at the end of the shift, so that Ms. Olson's end time became 5:45 p.m. on Monday through Thursday and 12:45 p.m. on Friday. The employer generally requires 24-hour of an absence. However, if that is not feasible, the employer's policy requires employees to provide notice as soon as possible, preferably before the start of the shift, by contacting their leader/supervisor. The employer accepts phone calls, text messages, and emails as proper forms of notice. The employer reviewed this policy with Ms. Olson when the employer revised its attendance policy in 2015. The employer revisited the absence reporting policy in its discussions with Ms. Olson as she

incurred attendance points. Throughout the employment, Ms. Olson resided in a southern area of Des Moines near Highway 5 and commuted about 15 miles to the workplace in West Des Moines near the west mix-master intersection. The commute would take 19 minutes in favorable weather. The commute route was mostly along Highway 5 and then along Interstate 35.

The final absence that triggered the discharge occurred on January 29, 2020, when Ms. Olson was late for work. Ms. Olson gave notice at 8:25 a.m. that she was running late for her shift that was to start at 8:15 a.m. Ms. Olson arrived and logged in at 8:39 a.m. Ms. Olson advises that her late arrival was attributable to poor driving conditions. While Ms. Olson was on Highway 5, she noted that several vehicles had gone into the ditch and were otherwise on the side of the road. Ms. Olson had her cell phone with her in the car. Ms. Olson elected not to call the employer and instead elected to send a text message. In order to send a text message, Ms. Olson needed to pull over and stop her vehicle. Ms. Olson stopped somewhere along Interstate 35 to provide late notice that she would be late.

The late arrival on January 29, 2020 followed other late arrivals. On January 24, 2020 Ms. Olson was late. Ms. Olson attributes that late arrival to seasonal weather. It is unclear when Ms. Olson gave notice of her January 24 late arrival. On January 28, Ms. Olson was late for personal reasons. It is unclear when Ms. Olson provided notice of her need to be late on January 28. On January 15, Ms. Olson started her 30-minute lunch break late, but then added a couple extra minutes to her lunch break before returning to work.

In making the decision to discharge Ms. Olson from the employment, the employer considered Ms. Olson's attendance during the last 12 months of the employment. On February 21, 2019, Ms. Olson was absent, but neither the employer nor Ms. Olson has additional information regarding that absence. On March 27, 2019, Ms. Olson had prior approval for take her daughter to an 8:00 a.m. dental appointment, but ended up missing the entire day when the appointment extended into an orthodontics consultation. Ms. Olson checked in with her supervisor throughout the day and gave notice at about 2:00 p.m. that she would not be reporting to work to finish her shift.

On May 22, 2019, Ms. Olson left work early to address a family emergency concerning her daughter. Ms. Olson spoke with her supervisor before departing for her daughter's school.

On May 28, 2019, Ms. Olson reported for work two hours late after a tree fell on her house and caused Ms. Olson's home to lose electricity. The loss of electricity resulted in Ms. Olson's alarm not sounding. Ms. Olson notified her supervisor that she would be absent for the entire day, but then elected to report a couple hours after her scheduled start time.

On June 5, 6 and 7, 2019, Ms. Olson was absent due to illness and with proper notice to the employer.

On July 18, 2019, Ms. Olson was late getting to work due to an automobile crash at the intersection of Highway 5 and Interstate 35. While Ms. Olsen waited for the obstruction to be removed from the roadway, she sent a text message to her supervisor to give notice of her need to be late.

On October 10, 2019, Ms. Olson was late for work for personal reasons. On that day, Ms. Olson's supervisor spoke to Ms. Olson about adjusting her start time from 8:00 a.m. to 8:15 p.m., but Ms. Olson declined that offer.

On November 11, 2019, Ms. Olson was late due to icy roadways. At 8:24 a.m., Ms. Olsen provided late notice to her supervisor by text message.

On December 10, 2019, Ms. Olson reported at 8:08 p.m. for her 8:00a.m. Ms. Olson believes the late arrival may have been attributable to the seasonal weather, but does not recall.

Ms. Olson's late arrivals occurred in the context or progressive discipline for attendance. On June 10, 2019, the employer issued a verbal warning. On July 18, 2019, the employer issued a written, second-level warning for attendance. On November 20, 2019, the employer issued a written, third-level warning for attendance. As of the November 20 warning, Ms. Olson was aware that her employment was in jeopardy. Ms. Olson was concerned about her ability to get to work on time during the winter months and asked whether the weather would be taken into consideration.

On December 11, 2019, Cassie Miller, Benefits Specialist, spoke with Ms. Olson in response to Ms. Miller's assertion that she had a medical condition that might cause her to be late in the mornings. Ms. Miller provided Ms. Olson with an Americans with Disabilities Act (ADA) request for accommodations document so that Ms. Olson could have her doctor provide information concerning a need for reasonable accommodation and so the employer and Ms. Olson could discuss reasonable accommodation. On December 24, 2019, Dr. Michael Agey, D.O., Ms. Olson's primary care physician, completed a Healthcare Information Questionnaire/Employee Request for Accommodations Under the Americans with Disabilities act (ADA). Dr. Agey indicated on the form that Ms. Olson was Diagnosed with Attention Deficit Disorder (ADD), that her daughter had the same diagnosis, and that her daughter was on the autism spectrum. Dr. Agey indicated that Ms. Olson's disability could make it difficult to meet specific time requirements, but that her disability did not limit major life activities. Dr. Agey indicated that Ms. Olson's disability would not impact her ability to perform essential job functions, but that her child's issues would impact her ability to be on time for work. Dr. Agey recommended a later start time and further suggested "flex time" or an ability to work from home. The employer received the documentation on January 2, 2020 and spoke with Ms. Olson on January 6, 2020. The employer determined it could not offer a flexible work schedule or work from home, but could provide the 15-minute later start time the employer first proposed in October 2019. On January 7, 2020, the 8:15 a.m. start time took effect.

#### **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).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See Iowa Administrative Code rule 871-24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See Iowa Administrative Code rule 871-24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For

example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The evidence in the record establishes a discharge for misconduct in connection with the employment, based on excessive unexcused absences. Iowa's seasonal weather can, on occasion, make it a challenge for commuters to get to work on time. Reasonable commuters adjust the start of their commute in anticipation of such issues. Ms. Olson had a relatively short, uncomplicated commute on Des Moines' south and west sides on well-traveled roadways one would expect to be among the first to be cleared of snow and treated for ice. In the event Ms. Olson needed to be late for work due to seasonal weather conditions or any other reason, the employer reasonably expected notice prior to the scheduled start of the shift so that the employer could adjust and plan accordingly. Ms. Olson's ADA medical certification materials indicate that Ms. Olson's parental responsibilities could impact on her ability to get to work relative to her 8:00 a.m. start time. The employer reasonably accommodated Ms. Olson by adjusting her start time to 8:15 a.m. In those instances wherein Ms. Olson needed to be late, a reasonable person would have provided timely notice by the most expedient means approved by the employer. Something as simple as a phone call would suffice. Ms. Olson consistently had the ability to provide such timely notice by phone call, but repeatedly elected to delay notice and to provide notice via text message, something that would require her to interrupt her commute and further delay her arrival.

The final absence on January 29, 2020 was an unexcused absence. While the weather may have been a factor, Ms. Olson provided late notice.

Ms. Olson's earlier 2020 absences included excused and unexcused absences. Ms. Olson also attributes her late arrival on January 24, 2020 to seasonal weather. The employer presented insufficient evidence to prove late notice of the absence and insufficient evidence to prove an unexcused absence on January 24. On January 28, 2020, Ms. Olson was late due to unspecified personal reasons. An absence due to personal reasons would presumably be for a reason within Ms. Olson's control. Accordingly, the late arrival on January 28 was an unexcused absence under the applicable law. The January 15, 2020 late lunch break and two-minute extension of the break was an isolated issue of a different nature than the attendance concerns, and does not rise to the level of an absence for purposes of determining whether Ms. Olson's unexcused absences were excessive.

Ms. Olson's 2019 absences included excused and unexcused absences. The employer presented insufficient evidence to prove an unexcused absence on February 21, 2019. The absence on March 27, 2019 was due to Ms. Olson's need to attend to her daughter's dental needs. Ms. Olson could not control how long the appointment ran. The employer was properly notified of the absence and the absence was an excused absence under the applicable law. Ms. Olson's early departure on May 22, 2019 was due to a bona fide emergency concerning her daughter. The employer was properly notified of Ms. Olson's need to leave work early and the absence was an excused absence under the applicable law. The May 28, 2019 late arrival was attributable to a so-called act of god, a tree falling on Ms. Olson's house and taking out her electricity. The late arrival and the late notice were beyond Ms. Olson's control under the circumstances. The late arrival on May 28, 2019 was an excused absence under the applicable law. Ms. Olson's absences on June 5, 6 and 7, 2019 were due to illness, were properly reported to the employer, and therefore were excused absences under the applicable law. The July 18, 2019 late arrival was attributable to an automobile crash along Ms. Olson's commuting route. As such, it was a matter beyond Ms. Olson's control. The employer presented insufficient to prove that Ms. Olson provided late notice of her need to be late for work and

presented insufficient evidence to prove the absences was unexcused under the applicable law. The evidence establishes a late arrival due to unspecified personal reasons on October 10, 2019. An absence due to personal reasons would presumably be for a reason within Ms. Olson's control. Accordingly, the late arrival on October 10, 2019 was an unexcused absence under the applicable law. The evidence establishes an unexcused absence on November 11, 2019, when Ms. Olson provided late notice that she would be late for work due to icy roadways. The evidence fails to establish an unexcused absence on December 10, 2019, a late arrival date that Ms. Olson asserts may have been attributable to the weather. The employer presented insufficient to rebut Ms. Olsen's testimony or to prove untimely notice.

Ms. Olson's unexcused tardiness on October 10, 2019, November 11, 2019, January 28, 2020 and January 29, 2020 was excessive. The pattern of unexcused tardiness demonstrated an intentional and substantial disregard of the employer's interests. Ms. Olson is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. Olson must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

This matter will be remanded to the Benefits Bureau for entry of overpayment decisions regarding the state benefits and the Federal Pandemic Unemployment Compensation (FPUC) benefits Ms. Olson received in connection with her claim.

**DECISION:**

The February 25, 2020, reference 01, decision is affirmed. The claimant was discharged on January 29, 2020 for misconduct in connection with the employment based on excessive unexcused absences. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

This matter is remanded to the Benefits Bureau for entry of overpayment decisions regarding the state benefits and the Federal Pandemic Unemployment Compensation (FPUC) benefits the claimant received in connection with her claim.



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James E. Timberland  
Administrative Law Judge

May 15, 2020  
Decision Dated and Mailed

jet/mh