

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

LAKISHA MOORE
Claimant

APPEAL NO: 16A-UI-09156-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SHEARERS FOODS BURLINGTON LLC
Employer

OC: 07/24/16
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 11, 2016, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 9, 2016. The claimant participated in the hearing. The employer provided a telephone number where it could be reached for the hearing but was not available at that number at the time of the hearing and did not respond to the administrative law judge's voice mail instructing her to call if she wished to participate in the hearing or request a postponement of the hearing.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time packer for Shearers Foods Burlington from November 18, 2005 to July 25, 2016. She was discharged for excessive unexcused absenteeism.

The employer's attendance policy allows employees to accumulate eight attendance points in a rolling eight-month period before termination results. Full day absences are assessed one point and half-day or less absences, either tardiness or leaving early, are assessed one-half point. An absence the day before or after a vacation day is assessed two points. Employees are allowed two bonus days after their 90-day probationary period which she may use whenever she wishes. Multiple day absences due to properly reported illness are assessed one point. If an employee is absent more than three consecutive workdays she must provide a doctor's note before returning to work.

On January 8, 2016, the claimant received one point because of properly reported illness; on February 1, 2016, she received one-half point for a partial day absence; on February 18, 2016, the claimant received one point for a partial day absence as it was the day before a scheduled vacation day; on February 23, 2016, the claimant received one point due to a properly reported illness in her family; on March 7, 2016, the claimant received one point for taking a bonus day;

on March 16, 2016, the claimant received one point for an absence due to home duties; on April 12, 2016, the claimant received one point for a properly reported illness in her family; and on April 21 and May 3, 2016, she received one-half point for being tardy.

On July 17, 2016, the claimant was suffering from a wisdom tooth infection. She reported for work but was in so much pain her acting supervisor, Jacob, instructed her to leave and go to the emergency room. The claimant did so and received a doctor's note excusing her until July 20, 2016. The claimant went to speak to the human resources manager July 18, 2016, because she was concerned about her point totals. The claimant had surgery on her wisdom teeth July 21, 2016, and was excused from work through July 22, 2016. The employer contacted the claimant July 25, 2016, and notified her it was terminating her employment for exceeding the allowed number of attendance points because it was not excusing her absence July 17, 2016, and was assessing her one point for that absence because it was more than half her shift in duration.

The claimant received a verbal warning in writing for attendance March 9; a first written warning for attendance March 18; a second written warning for attendance April 15; a final written warning for attendance April 26; and her employment was terminated for excessive unexcused absenteeism July 25, 2016.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

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 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(7) provides:

(7) Excessive unexcused absenteeism. 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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

The claimant received one point for using an allowed bonus day March 7, 2016, and received her final point after reporting to work with a severe wisdom tooth infection July 17, 2016. The claimant was sent home from work shortly after arriving for work July 17, 2016, by acting supervisor Jacob, and consequently, because it was due to illness, that absence cannot be the basis for the claimant's termination.

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and the evidence provided by the claimant does not establish disqualifying job misconduct as that term is defined by Iowa law. The employer has not met its burden of proof.

Because the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established. Therefore, benefits are allowed.

DECISION:

The August 11, 2016, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs