

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

RYAN J SPEIRS
Claimant

ELLER CONSTRUCTION CO INC
Employer

APPEAL 20A-UI-10789-HP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 12/29/19
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Ryan Speirs filed an appeal from an August 17, 2020 (reference 03) unemployment insurance decision that denied benefits because he had been discharged from work by Eller Construction Co. Inc. (“Eller Construction”) on May 31, 2020, for excessive unexcused absenteeism after being warned. The parties were properly notified of the hearing. The hearing was held on October 21, 2020. Speirs appeared and testified. Hallie Eller and Kathy Kephart appeared and testified on behalf of Eller Construction. I took administrative notice of the claimant’s unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause?

FINDINGS OF FACT:

On June 11, 2019, Speirs commenced full-time employment as a construction worker for Eller Construction. Hallie Eller is the office administrator and part owner of Eller Construction. Her brother, Rick Eller, is also a part owner of Eller Construction and he was Speirs’s immediate supervisor.

Speirs left work early on June 1, 2020. He called in sick on June 2, 2020. On June 3, 2020, when he called in Rick Eller spoke with Speirs and told him he had been terminated for excessive absenteeism. Later that day Kathy Kephart, the office assistant, took several calls from Speirs. Speirs wanted to keep his job. Hallie Eller also took a call from Speirs. Speirs asked for his job back and Hallie Eller told him Rick Eller had terminated his employment. Speirs notified Hallie Eller that he was bisexual and he had been discriminated against based on his sexual orientation at work. Hallie Eller relayed she would investigate the situation, but he was still terminated.

Eller Construction has an attendance policy. Hallie Eller testified the policy runs for the calendar year and restarts in January each year. Under the policy three unexcused tardy occurrences count as one unexcused absence, three unexcused absences result in a verbal warning, four

unexcused absences result in a written warning, six unexcused absences result in a final written warning, and on the eighth unexcused absence, the employee is terminated.

Speirs had been disciplined for attendance in 2019. As testified to by Hallie Eller, the attendance policy restarted in 2020 because it runs on the calendar year. In 2020, Speirs had not received any written disciplinary warnings for attendance.

On June 1, 2020, Speirs left early from work. On June 2, 2020, Rick Eller told Kephart if Speirs called in sick she was to tell Speirs he needed to show up for work on June 3, 2020. Speirs called in sick and spoke with Kephart. Kephart told him he needed to show up for work on June 3, 2020. Kephart did not inform Speirs he would be terminated if he was absent on June 3, 2020. No one warned Speirs his job was in jeopardy before June 3, 2020.

REASONING AND CONCLUSIONS OF LAW:

Under Iowa Code section 96.5(2)a,

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.

871 Iowa Administrative Code 24.31(1)a, defines the term "misconduct" 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 Iowa Legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 558 (Iowa 1979).

871 Iowa Administrative Code 24.32(4) also provides,

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a

suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

And 871 Iowa Administrative Code 24.32(8) provides:

Past acts of misconduct. 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 employer bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984).

Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits; such misconduct must be "substantial." *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806, 808 (Iowa Ct. App. 1984). The definition of misconduct in the administrative rule focuses on deliberate, intentional, or culpable acts by the employee. *Id.* When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* at 808-09. Negligence does not constitute misconduct unless it is recurrent in nature; a single act is not disqualifying unless it is indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731, 735 (Iowa Ct. App. 1986). Additionally, poor work performance is not misconduct in the absence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211, 213 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661, 666-69 (Iowa 2000). What constitutes misconduct justifying termination of an employee and what misconduct warrants a denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). Instances of poor judgment are not misconduct. *Richers v. Iowa Dep't of Job Serv.*, 479 N.W.2d 308, 312 (Iowa 1991); *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 555 (Iowa Ct. App. 1986).

871 Iowa Administrative Code 24.32(7), provides, "[e]xcessive 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." The Supreme Court has held 871 Iowa Administrative Code 24.32(7) accurately states the law. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984).

Excessive absences are not considered misconduct unless unexcused. *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 and including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 558 (Iowa Ct. App. 2007).

The determination of whether unexcused absenteeism is excessive requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192. The absences must also be unexcused. *Cosper*, 321 N.W.2d at 10. An absence can be unexcused if it did not constitute reasonable grounds or if it was not properly reported. *Id.*; *Higgins*, 350 N.W.2d at 191. Excused absences are those with "appropriate notice." *Cosper*, 321 N.W.2d at 10. Absences in good faith, for good cause, and

with appropriate notice are not misconduct. *Id.* Such absences may be grounds for discharge, but not for disqualification of benefits because substantial disregard for the employer's interest has not be shown and this is essential for a finding of misconduct. *Id.*

Eller Construction did not follow its attendance policy in this case. Hallie Eller testified the policy requires a written warning and final written warning before termination. The attendance policy runs on a calendar year and restarted in January 2020. Eller Construction did not provide Speirs with a written warning before Rick Eller terminated his employment in 2020. Speirs testified he did not know his job was in jeopardy before June 3, 2020. Kephart did not notify Speirs he would be terminated if he did not show up for work on June 3, 2020. While Eller Construction has the right to terminate employees for nondiscriminatory reasons, I find Eller Construction has failed to establish it terminated Speirs for disqualifying misconduct. Benefits are allowed, provided Speirs is otherwise eligible.

DECISION:

The August 17, 2020 (reference 03) unemployment insurance decision denying unemployment insurance is reversed in favor of the claimant/appellant. Benefits are allowed, provided the claimant is otherwise eligible.



Heather L. Palmer
Administrative Law Judge
Unemployment Insurance Appeals Bureau
Iowa Workforce Development
1000 East Grand Avenue
Des Moines, Iowa 50319-0209
Fax (515) 478-3528

October 23, 2020
Decision Dated and Mailed

hlp/sam