

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KELLI OWENS**  
Claimant

**DUNCAN HEIGHTS INC**  
Employer

**APPEAL 20A-UI-06649-HP-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/30/19**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Claimant Kelli Owens filed an appeal from a June 19, 2020 (reference 08) unemployment insurance decision that denied benefits based upon her discharge from employment. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for July 27, 2020 at 1:00 p.m. Owens appeared and testified. Attorney Phillip Garland represented Duncan Heights, Inc. ("Duncan Heights"). Heidi Hansen, Kelly Eekoff, and Monica Abbas appeared and testified on behalf of Owens. Exhibits 1 through 9 were admitted into the record. I took administrative notice of the claimant's unemployment insurance benefit records maintained by Iowa Workforce Development.

**ISSUE:**

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

**FINDINGS OF FACT:**

Owens commenced her employment as a community support staff member for Duncan Heights on March 9, 2020. Owens worked an average of thirty-two to forty hours per week. Hansen, the executive director of Duncan Heights, was Owens's immediate supervisor.

When Owens commenced her employment, she requested to be off May 21, 2020 through May 22, 2020, for her birthday. Owens intended to travel out of town for her birthday. May 25, 2020, was Memorial Day, a holiday. Duncan Heights granted Owens's leave request. Duncan Heights later required a quarantine period for staff traveling outside of Iowa. Hansen reported Owens rescinded her vacation request when she learned she would have to self-quarantine. Owens denies she rescinded her vacation request.

Duncan Heights scheduled to work May 21, 2020 and May 22, 2020. The schedule is often updated after it is posted and employees are sometimes scheduled to work when they have requested a day off.

On May 21, 2020, Owens sent Eekoff a text message stating she would not be in on May 21, 2020 or May 22, 2020, because she was going out of town. Eekoff asked Owens if she had found a replacement. Owens did not find a replacement. Duncan Heights has a policy requiring employees to find a replacement if they are going to be absent for work. Eekoff reported employees do not always find their own replacements and the management staff sometimes have to fill in. Abbas, the human resources manager, testified no employee has been terminated for failing to find a replacement. Duncan Heights found a replacement for Owens.

Hansen spoke with Owens on May 22, 2020 and reported Owens told her she would be back to work on May 25, 2020. Dawn Nedved completed an unsigned document stating she overheard Hansen's conversation with Owens on May 21, 2020 and that Owens stated she had planned to be back in town on May 25, 2020. A text message from Owens also documents she told Hansen she would be back Monday morning. (Ex. 9)

Duncan Heights scheduled Owens to work on May 25, 2020. Hansen testified Owens was a no call, no show on May 25, 2020. Hansen terminated Owens's employment on May 26, 2020, for being a no call, no show on May 25, 2020. At the time of her termination, Owens was within her 90-day probationary period. Hansen reported Owens had not engaged in a no call, no show, before May 25, 2020.

Owens testified she did not receive a copy of the schedule scheduling her to work on May 25, 2020. Owens reported she was home on that date and could have come to work. I do not find Owens's testimony reasonable and consistent with the other evidence I believe. Exhibit 7 is a contemporaneous text message of the schedule sent to Owens on May 22, 2020. Eekoff sent a copy of the schedule by text message to Owens and the rest of the staff on May 22, 2020. (Ex. 7) On the schedule, Owens was scheduled to work on May 25, 2020. (Ex. 7) I believe Duncan Heights sent Owens the schedule on May 22, 2020.

The last day Owens performed services for Duncan Heights was May 19, 2020. Hansen terminated her employment over the telephone on May 26, 2020. On June 1, 2020, Owens came into Duncan Heights. Hansen gave her a written termination notice, Exhibit 1. Owens declined to review the termination notice with Hansen.

## **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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Id.* at 11. 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.*


Owens contacted Duncan Heights on May 21, 2020, stating she would be absent May 21, 2020 and May 22, 2020. She also reported she would be back in town on May 25, 2020. Duncan Heights has a policy requiring its employees to find their own replacements. Employees do not always find their own replacements and Duncan Heights staff finds replacements for the employees. Owens did not find a replacement for May 21, 2020 and May 22, 2020. Duncan Heights found a replacement for her.

On May 25, 2020, Owens did not show up for work or call to say she was going to be absent. Hansen terminated her employment for being a no call, no show. Duncan Heights has a policy that an employee is terminated the first no call, no show.

Owens denied she knew she was scheduled to work on May 25, 2020. I do not find her testimony reasonable and consistent with the other evidence I believe. I believe Duncan Heights sent Owens the schedule scheduling her to work on May 25, 2020 on May 22, 2020. Owens was in her probationary period when she decided not to show up for work or to call work to report she was going to be absent. Duncan Heights had the right to discharge her for any nondiscriminatory reason during her probationary period. While I do not find Owens to be a credible witness, there was no evidence presented Duncan Heights warned Owens she would be terminated for being a no call, no show on May 25, 2020. I do not find Owens had excessive absences during her employment, establishing she engaged in a substantial disregard for the employer’s interest essential for finding she engaged in misconduct to preclude Owens from receiving unemployment benefits. Benefits are allowed.

**DECISION:**

The June 19, 2020 (reference 08) unemployment insurance decision denying unemployment insurance benefits is reversed. The employer has not established the claimant was discharged for misconduct for a disqualifying reason. 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

August 4, 2020  
Decision Dated and Mailed

hlp/scn