

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

ELIZABETH OLSON
Claimant

SHEARERS FOODS BURLINGTON LLC
Employer

**DIA APPEAL NO. 21IWDUI0095
IWD APPEAL NO. 20A-UI-08458**

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 5/10/20
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the July 7, 2020 (reference 01) unemployment insurance decision that denied benefits based upon claimant's discharge from employment for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified of the hearing. A telephone hearing was held on September 8, 2020 before Administrative Law Judge Laura Lockard. The claimant, Elizabeth Olson, participated personally. The employer, Shearers Foods Burlington LLC, did not participate. The administrative law judge took administrative notice of the July 7, 2020 decision, the fact finding documents, and the claimant's appeal. The employer submitted the following documents: May 11, 2020 e-mail from Jill Nieto; May 8, 2020 Disciplinary Action Report; January 29, 2020 Disciplinary Action Report; and Attendance Policy. The documents submitted by the employer were admitted as evidence.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant Elizabeth Olson was employed full-time by Shearers Foods Burlington LLC beginning in October 2012. Her most recent job title was quality technician; her supervisor was quality manager Art Cairns. Claimant worked Monday through Friday from 3:00 PM to 11:00 PM. Claimant was discharged on May 11, 2020 for violation of the employer's attendance policy.

The employer's attendance policy and attendant disciplinary measures are based on "occurrences." There are graduated penalties for the first through eighth occurrences, from documentation on the employee's attendance record, for a first and second occurrence, up to termination of employment, for an eighth occurrence. Attendances are measured on a rolling

calendar year, with the eight months prior to the most recent occurrence counting toward the employee's occurrence total. Relevant for purposes of this case, each unscheduled day out of work equals one occurrence. Health absences that require several unscheduled days out in a row are considered a single occurrence if the absences are all for the same health reason. Absences of three or more days require a health care provider's verification to return to work. An employee who leaves without working at least one-half of the scheduled work day is charged with one occurrence. If an employee leaves after working one-half of the scheduled work day, the employee is only charged one-half of an occurrence. The employer counts tardiness as one-half of an occurrence. The attendance policy provides, "If a pattern of attendance and/or tardiness issues exists, it may result in accelerated warnings and/or termination of employment." The policy specifically defines absences that do not constitute occurrences, including pre-approved vacations, holidays, absences covered the Family Medical Leave Act, and approved personal leaves of absence. Claimant was provided a copy of the attendance policy in 2014.

Claimant has been diagnosed with depression and anxiety. Her anxiety worsened in the time period prior to the COVID-19 pandemic and after the pandemic began. Claimant also suffers from severe headaches triggered by anxiety. Claimant had been taking leave under the Family Medical Leave Act (FMLA) from March 2019 through March 2020; she testified that she was permitted two absences per month as FMLA leave. Claimant does not believe that the employer included any of her absences covered by FMLA in calculating her point, or occurrence, total.

Claimant received a Disciplinary Action Report on January 29, 2020. That report listed nine incidents, which totaled 5.5 "points" and indicated it was claimant's first counseling occurrence. The report advises claimant to monitor her attendance going forward.

In April 2020, claimant had an appointment with her health care provider, who prescribed additional medication for anxiety, which she instructed claimant to take only when she was at home and not working. On May 6, 2020, claimant called in sick to work due to her anxiety and depression. On May 7, claimant reported to work on time at the beginning of her shift. She began to work and then experienced a panic attack. She talked to her supervisor and told him that she was leaving due to the panic attack and the need to take her medication, which she was advised by her health care provider not to take at work. This is the proper procedure to report leaving early. Claimant does not remember exactly what time she left, but it would have been at least halfway through her shift, as the employer only counted one-half occurrence for this incident. After leaving work, claimant went home and took her medication.

Claimant reported for work and worked on May 8, 2020. On that date, the employer issued claimant a Disciplinary Action Report. The report lists 13 incidents that total 8.5 "points": seven tardies (listed as one-half point each); four unexcused absences (listed as one point each); and two instances of leaving early (listed as one-half point each).¹ Olson's absence on May 6, 2020 is listed as unexcused; the employer charged her one-half point for leaving early on May 7, 2020. Under Action Taken, the box labeled "Occurrence – Suspension (optional)" is filled in. In the box for the employer to list expectations going forward, the employer has written, "Please monitor you [sic] attendance." Olson signed the report on May 8, 2020. Olson was informed that she was discharged on May 11, 2020 for violation of the attendance policy.

The absences designated as unexcused on the disciplinary report were all related to health issues and were properly reported by claimant. The points for tardies were related to health issues as

¹ Under the employer's policy, a no call/no show is designated as two occurrences. The May 8 report does not list any instances of no call/no show by claimant.

well; claimant was having frequent, severe headaches and came in late because she was trying to get her headaches to a level where she could be up and function for work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged from employment for a disqualifying reason. Benefits are allowed.

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(1) provides, in relevant part:

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).

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.

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734, 737 (Iowa App. 1990). 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 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 App. 1988).

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 (Iowa App. 1984). The focus is on deliberate, intentional, or culpable acts by the employee. When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* In contrast, 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. *Id.*

When reviewing an alleged act of misconduct, the finder of fact may consider past acts of misconduct to determine the magnitude of the current act. *Kelly v. Iowa Dep't of Job Serv.*, 386 N.W.2d 552, 554 (Iowa App. 1986). However, conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa App. 1988).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy.

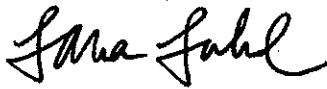
The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984).

Thus, the first step in the analysis is to determine whether the absences were unexcused. 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." *Cosper*, 321 N.W.2d at 10. Absences due to properly reported illness are excused, 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*, *supra*; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d at 554. Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, *supra*.

In this case, the absences for which claimant accrued points leading up to her termination are properly characterized as excused. The claimant credibly testified that the absences and tardies for which she was awarded points by the employer, including her final absence on May 7, 2020, were all related to illness and were all properly reported. The employer has provided no evidence to refute this. Accordingly, the employer has not carried its burden of proving that claimant is disqualified from receiving benefits because of a current act of substantial misconduct within the meaning of Iowa Code section 96.5(2).

DECISION:

The July 7, 2020 (reference 01) unemployment insurance decision is reversed. Claimant was not discharged from employment for any disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Laura E. Lockard
Administrative Law Judge
Department of Inspections and Appeals
Administrative Hearings Division

9-15-20

Decision Dated and Mailed

LEL/lb

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at <https://www.iowaworkforcedevelopment.gov/pua-information>.