

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS L HARWOOD
Claimant

APPEAL NO. 12A-UI-02425-VST

**PRAIRIE MEADOWS RACETRACK &
CASINO**
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 01/08/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated February 29, 2012, reference 01, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 27, 2012. Claimant participated. The employer participated by Michelle Wilkie, employee relations manager. The record consists of the testimony of Michelle Wilkie and the testimony of Thomas Harwood.

ISSUE:

Was the claimant discharged for misconduct that disqualifies him from receiving unemployment insurance benefits?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is in the gaming business and operates a casino and horse racing track. The claimant was hired on February 5, 2007. He was a full-time table games dealer. His last day of work was January 3, 2012. He was terminated on January 9, 2012, for violation of the employer's attendance policy.

The incident that led to the claimant's termination occurred on January 3, 2012. The claimant was late for work and did not call ahead of time. He accumulated one point under the employer's attendance policy. This point placed him at 8 ½ points, which would normally place him on probation. The employer also had a policy that stated that if an employee had two attendance probations within a twelve-month period that the employee would be terminated. The claimant had been placed on an attendance probation on May 25, 2011. Since he now was on his second attendance probation within twelve months, he was terminated.

The claimant's absences, with the exception of the final absence, were due to personal illness. These absences due to personal illness were all properly reported with the exception of May 23, 2011.

REASONING AND CONCLUSIONS OF LAW:

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.

871 IAC 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.

871 IAC 24.32(8) provides:

(8) 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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of

misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to show that the claimant was discharged for excessive unexcused absenteeism. The claimant's absences were primarily due to personal illness, which was properly reported with one exception. Personal illness that is properly reported is considered an excused absence under Iowa law. There are only two absences that can be called unexcused absences, which includes the final absence. An employer is entitled to promulgate and enforce an attendance policy. Not every violation of an attendance policy that leads to termination will disqualify a claimant from receiving unemployment insurance benefits. In this case, the evidence only shows excessive absenteeism. The employer's burden was to show excessive and unexcused absenteeism. Accordingly, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated February 29, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs