

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIRIAN E CARBALLO ESCOBAR
Claimant

APPEAL NO: 13A-UI-07231-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS RACETRACK &
CASINO**
Employer

OC: 05/26/13
Claimant: Respondent (2-R)

Section 96.5-2-a – Discharge
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness
Section 96.3-7 – Recovery of Overpayment

STATEMENT OF THE CASE:

The employer appealed a department decision dated June 14, 2013, reference 01, that held the claimant was not discharged for misconduct on May 23, 2013, and benefits are allowed. A telephone hearing was held on July 23, 2013. The claimant did not participate. Pam Anderson, HR Generalist, participated for the employer.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is overpaid unemployment benefits.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record, finds: The claimant began employment on March 7, 2012, and last worked for the employer as a full-time housekeeper on May 20, 2013. She received the employer attendance policies in an employee handbook. Nine absences are grounds for termination.

The employer put claimant on 90-day attendance probation on April 4, 2013 for incurring eight absences. Although some absences were due to reported illness, others involved personal and family. She was late to work on November 17, 2012. She was warned that any further occurrence would result in termination. On May 20 claimant clocked in a few minutes late. She offered a variety of reasons for it, but a security video show she had languished in the casino until she is viewed running to the time clock.

The employer discharged claimant for violation of its attendance policy on May 23, 2013. Claimant failed to respond to the hearing notice. She has received benefits on her claim.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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(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 administrative law judge concludes employer has established claimant was discharged for misconduct in connection with employment on May 23, 2013 due to excessive unexcused absences.

The employer established claimant's absenteeism was excessive to the point she got a 90-day probation attendance warning that a further occurrence would lead to termination. Claimant did not participate to contest her absence reasons, and the employer offered evidence they were excessive. The employer established claimant was not forthright about why she clocked-in late on May 20 that was considered in the final termination incident.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since claimant has been disqualified in this matter after receiving benefits, the overpayment issue is remanded to Claims for a decision.

DECISION:

The department decision dated June 14, 2013 reference 01 is reversed. The claimant was discharged for misconduct on May 23, 2013. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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