

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JANA L EBERTOWSKI
Claimant

APPEAL NO. 10A-UI-02998-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO CO BLUFFS INC
Employer

**Original Claim: 01/31/10
Claimant: Appellant (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Jana Ebertowski filed a timely appeal from the representative's February 19, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 15, 2010. Ms. Ebertowski participated. Attorney Susan Schneider represented the employer and presented testimony through Becky Overman, Casino Operations Scheduler, and Emily Jones, Team Relations Manager. Exhibits One through Seven were received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jana Ebertowski was employed by Ameristar Casino Council Bluffs, Inc., as a part-time dealer from January 2009 until January 28, 2010, when Austin Muchemore, Vice President of Casino Operations, discharged her from the employment for attendance. Becky Overman, Casino Operations Scheduler, communicated the discharge to Ms. Ebertowski.

The final absence that prompted the discharge occurred on January 27, 2010, when Ms. Ebertowski forgot about a mandatory meeting and failed to attend. On January 28, 2010, Ms. Overman was reviewing employee attendance for the mandatory meeting(s), noted Ms. Ebertowski's absence, and telephoned Ms. Ebertowski to inquire why she had not attended. Ms. Ebertowski indicated at that time that she had forgotten the meeting.

The employer has a written attendance policy. The employer utilizes an attendance point system that does not mesh well with applicable unemployment insurance law. The employer assigns points to most, if not all absences, based on the nature of the absence.

In making the decision to discharge Ms. Ebertowski from the employment, the employer considered prior absences. The employer did not consider Ms. Ebertowski's absence on December 25, 2009, which absence was due to inclement weather that prevented employees from traveling to work. Ms. Ebertowski's next most recent absence had been on November 14, 2009, when Ms. Ebertowski had been absent to care for her sick three-year-old child and properly reported the absence by telephoning the employer two hours prior to the scheduled start of her shift. Ms. Ebertowski had left work early on October 7, 2009, due to a personal/marital issue. Ms. Ebertowski had been absent with proper notice on October 3 and 4, 2009 to care for her daughter, who suffers from frequent ear infections. Ms. Ebertowski's next most recent absences had been in July 2009. On July 16, 2009, Ms. Ebertowski went home early due to illness, properly reported her need to leave work, and a supervisor approved the departure. On July 17, Ms. Ebertowski was absent due to illness and properly reported the absence. On June 11, 2009, Ms. Ebertowski was absent for a reason she cannot recall and the employer did not document, but she properly reported the absence. Finally, on April 17, 2009, Ms. Ebertowski went home early due to illness, properly reported her need to leave work, and a supervisor approved the departure.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4). When it is in a party’s power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party’s case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant’s absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant’s *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility, such as transportation and oversleeping, are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer’s policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes an unexcused absence on January 27, 2010, when Ms. Ebertowski failed to appear for a mandatory meeting because she forgot about it. The evidence establishes another unexcused absence on October 7, 2009, when Ms. Ebertowski left work early due to a personal/marital issue. All additional absences considered by the employer—with the possible exception of June 11, 2009, when Mr. Ebertowski was absent for a reason she cannot recall and the employer did not document—were absences due to illness properly reported and were therefore excused absences under the applicable law. Because the burden is on the employer to prove misconduct, the administrative law judge must conclude that the June 11, 2009 absence was an excused absence under the applicable law.

The evidence fails to establish excessive unexcused absences. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Ebertowski was discharged for no disqualifying reason. Accordingly, Ms. Ebertowski is eligible for benefits, provided she is otherwise eligible. The employer’s account may be charged for benefits paid to Ms. Ebertowski.

DECISION:

The Agency representative's February 19, 2010, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw