

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MILA KING
Claimant

APPEAL NO. 19A-UI-04374-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS RACETRACK
& CASINO**
Employer

OC: 03/24/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 24, 2019, reference 03, decision that held the claimant was eligible for benefits provided she met all other eligibility requirements and that employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on May 9, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on June 24, 2019. Claimant Mila King participated. Gina Vitiritto represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 3 into evidence.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Mila King was employed by Prairie Meadows Racetrack & Casino as a part-time Casino Floor Attendant from August 2018 until May 9, 2019, when the employer discharged her from the employment for dishonesty in connection with one or more absences. Ms. King last performed work for the employer on April 27, 2019. At that time, Ms. King has plans to travel to Arizona to vacation with friends. One of Ms. King's travel companions had purchased a round-trip airplane ticket for Ms. King. At the time the ticket was purchased, the return flight was scheduled for May 5, 2019. On April 28, 2019, Ms. King called in an absence due to purported illness. On that same day, Ms. King flew to Arizona with her travel companions. The weight of the evidence establishes that Ms. King was not ill on April 28. April 29, April 30 and May 1 were Ms. King's regularly scheduled days off. Ms. King had submitted a request to have May 2 and May 3 off without pay

and had been approved to have those days off. Ms. King was scheduled to work on May 4 at 11:00 a.m., but did not report for work that day. At 10:01 a.m. Iowa time, Mr. King contacted the employer to report that she would be absent due to purported illness. The weight of the evidence indicates that Ms. King was not ill. On May 5, 2019, Ms. King flew back to Iowa with her travel companions.

On May 7, 2019, the employer met with Ms. King to discuss her attendance, the absence on May 4, the employer's belief that Ms. King had provided late notice of the May 4 absence. The employer's attendance policy required that Ms. King notify the employer at least an hour prior to her shift if she needed to be absent. Ms. King was aware of the absence reporting requirement. During the May 7 meeting, Ms. King offered to show the employer her phone and advised that call time documented by her phone would be off because she had been in Arizona at the time of the call. Only then did the employer learn that Ms. King had been in Arizona at the time of the absence due to purported illness. The employer suspended Ms. King on May 7, 2019 and discharged her on May 9, 2019.

Ms. King established an original claim for benefits that was effective March 24, 2019 and received \$917.00 in benefits for three weeks between May 5, 2019 and May 25, 2019. Prairie Meadows is a base period employer in connection with the claim.

On May 22, 2019, an Iowa Workforce Development deputy held a fact-finding interview that addressed Ms. King's separation from the employment. Ms. Vitiritto represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

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.

Iowa Admin. Code r. 871-24.32(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.

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).

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).

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). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa Ct. App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.*

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment based on intentional dishonesty. Ms. King's testimony that she was ill April 28, 2019 and on May 4, 2019 was not credible. Ms. King's professed ignorance about the details of the ticket purchase and boarding pass was not credible. The weight of the evidence establishes that Ms. King left on her group vacation to Arizona on April 28, 2019 with the intention of not returning until May 5, 2019. To make the trip to Arizona, Ms. King called in an absence for April 28 and dishonestly stated she was ill that day. Ms. King then called in an absence for May 4 and dishonestly stated she was ill that day. Ms. King's dishonesty indicated a willful and wanton disregard of the employer's interests. This was especially so, given the nature of the employment. Ms. King is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. Ms. King must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Ms. King received \$917.00 in benefits for three weeks between May 5, 2019 and May 25, 2019, but this decision disqualifies her for those benefits. Accordingly, the benefits Ms. King received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Ms. King is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The May 24, 2019, reference 03, decision is reversed. The claimant was discharged on May 9, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant was overpaid \$917.00 in benefits for three weeks between May 5, 2019 and May 25, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs