

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**NICK P AUGUSTINE**  
Claimant

**APPEAL NO. 08A-UI-10335-L**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COTTAGE INN LLC**  
Employer

**OC: 10/05/08 R: 02**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the October 27, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 24, 2008 in Des Moines, Iowa. Claimant participated. Employer participated through Eric Stimson.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time line cook through September 14, 2008, when he was discharged. He was scheduled to open at 6:30 a.m. on September 14 and called near that time to advise employer he would not be able to report to work, as his wife, who also works at the restaurant, had not returned home that evening and he needed to stay home with the children. She got home about 8 a.m. and said she went in to work and they found someone else to cook and told her that he was fired. He had missed work one time because of pain in his hip and another time because of reported illness the night before his shift. He did not miss work because of being incarcerated, being hung over, or staying out too late the night before. He was not warned his job was in jeopardy or that employer was concerned about his attendance. He has not been incarcerated in the last year and has not provided inaccurate reasons to employer for any absence.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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 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 Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The two absences related to reported illness or injury are excused, and employer has not established that claimant misrepresented the reason for any absence. The final absence is considered unexcused as it was claimant's (and his spouse's) responsibility to arrange for child care, but the absence is not disqualifying since it does not meet the excessiveness standard. Benefits are allowed.

#### **DECISION:**

The October 27, 2008, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw