IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARIA HARRIS
Claimant

PRAIRIE MEADOWS RACETRACK & CASINO
Employer

APPEAL NO: 09A-UI-06110-B

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/22/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Maria Harris (claimant) appealed an unemployment insurance decision dated April 9, 2009, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Prairie Meadows Racetrack & Casino (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Des Moines, Iowa on May 13, 2009. The claimant participated in the hearing with her husband Michael Harris, in attendance. The employer participated through Mary Jamieson, Human Resources Administrative Assistant. Employer's Exhibits One through Five and Claimant's Exhibit A were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time table games dealer from March 28, 2005 through March 16, 2009. She was discharged from employment due to violation of the attendance policy. The employer's attendance policy provides that employees are discharged after accumulating nine attendance points and/or when an employee has two or more attendance probations within a 12-month period. A verbal warning is issued to an employee at six absences or six attendance points and a written warning is issued after seven. An employee is placed on probation after eight absences or eight attendance points.

The employer issued verbal warnings to the claimant for poor attendance on February 6, 2006; November 5, 2007; and February 4, 2008. A written warning was issued to her on June 20, 2008 and she was placed on an attendance probation on that same date. A verbal warning was issued to her on both November 29, 2008 and December 23, 2008. The claimant did not miss

work for three months and a point was removed. A verbal warning was issued to her on February 13, 2009 which placed her at seven points. According to the employer's policy, a written warning should have been issued at this level.

The claimant was sent home by the employer on March 6, 2009 even though she told him she did not want to leave. One of her eyes was pink and another employee complained that she had pink eye so the claimant was sent home. The claimant testified she had irritated her eye with eyeliner and knew she did not have pink eye. The employer presented hearsay evidence that the claimant told her co-employees that she had pink eye and the employer refused to let her go home but the claimant outright denies that claim. The employer assessed a half point to the claimant even though she did not want to go home. A half point is assessed to employees who request to go home ill but no points are assessed when an employee is sent home by the employer. The claimant was late for work on March 10, 2009 and was assessed another half point which placed her at eight absences or eight attendance points. The employer determined she should have been placed on an attendance probation even though she had not previously received a written warning. Since this was the claimant's second probation within 12 months, she was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The claimant was discharged for violation of the attendance policy because she had been placed on an attendance probation twice within a 12-month period. However, the employer did not follow its own attendance policy with the claimant. She did not receive a written warning on February 13, 2009 which she should have received since she was at seven points. The employer assessed the claimant a half point when the employer sent her home on March 6, 2009. However, the evidence clearly shows the claimant did not want to go home and she should therefore not have been assessed a half point that day. She was late on March 10, 2009 and was assessed another half point which placed her at eight points. The claimant should not have been at eight points, but additionally, she should not have been placed on an attendance probation without first receiving a written warning. For an employee to be disqualified for failure to follow policy, the employer should be in compliance with that same policy. Since the employer was not in compliance with its policy, it has not met its burden. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated April 9, 2009, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/css