

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RHIANNON A YOUNGBEAR
Claimant

APPEAL NO. 12A-UI-10693-VST

SAC & FOX TRIBE
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/05/12
Claimant: Respondent (2R)

Section 96.5-2-A – Discharge for Misconduct
Section 96.3-7 – Overpayment of Benefits

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated August 24, 2012, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 3, 2012. The claimant participated personally. The employer participated by Lucie Roberts, the human resources director, and Connie Thompson, the hotel administrative assistant. The record consists of the testimony of Lucie Roberts; the testimony of Connie Thompson; the testimony of Rhiannon Youngbear; and Employer's Exhibits 1-22.

ISSUES:

Whether the claimant was discharged for misconduct.

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is in the gaming business. The claimant was hired on January 23, 2008, as a PBX reservationist for the casino. The claimant was a full-time employee. Her last day of work was July 15, 2012. She was terminated on July 18, 2012.

The employer has a point based attendance system. Points are given for certain types of absences. The policy is written and provided to the employees. When an employee reaches 12 points, he or she is terminated. The claimant reached 12 points as a result of absences on July 12, 2012 and July 13, 2012. The claimant was absent because her car broke down and she was unable to get to work.

The claimant was on a final written warning for attendance problems as of June 18, 2012. The claimant was at 11 attendance points on that date. The primary reason for the claimant's

accumulation of points was tardiness. (Exhibits 10 and 11) For each instance of tardiness, the claimant received half a point. (Exhibits 10 and 11) For example, the claimant was tardy on April 5, 2012; April 6, 2012; April 7, 2012; April 22, 2012; April 23, 2012; and April 28, 2012. (Exhibit 10) The claimant knew that when she received her final attendance warning that her job was in jeopardy.

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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. Absences due to matters of personal responsibility, such as transportation, are considered unexcused absences. The employer has the burden of proof to show misconduct.

The evidence in this case established that the claimant was discharged for excessive unexcused absenteeism. The employer has a point based attendance system and the claimant exceeded the permissible number of absences under that attendance system. The final points were for absences on July 12, 2012, and July 13, 2012. The claimant's absences on those dates were due to transportation problems, which are considered unexcused absences under Iowa law. The majority of the claimant's absences were due to tardiness. The employer testified that had the claimant not been repeatedly late for work, she would still have a job. Since the employer has shown excessive unexcused absenteeism, misconduct has been established. Benefits are denied.

The next issue is overpayment of benefits.

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.

The overpayment issue is remanded to the Claims Section for determination.

DECISION:

The decision of the representative dated August 24, 2012, reference 01, is reversed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible. The overpayment issue is remanded to the Claims Section for determination.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css