IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

JILL A. SMITH Claimant **MYSTIQUE CASINO** **DUBUQUE RACING ASSOCIATION LTD** Employer	**DIA APPEAL NO. 21IWDUI0192** **IWD APPEAL NO. 20A-UI-15191** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: March 29, 2020** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant, Jill Smith, filed an appeal from the November 4, 2020 (Ref. 01) unemployment insurance decision that denied benefits based upon a determination that Claimant was discharged for excessive unexcused absenteeism after being warned. A telephone hearing was held on January 22, 2021. Claimant appeared on her own behalf and testified. Employer had a representative appear and testify. The administrative file, including the decision under review and Claimant's exhibit, was admitted into the record, and the matter is now fully submitted.

ISSUE(S):

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant commenced employment with Employer in June of 2016, working at table games. For all relevant time periods, Employer had a disciplinary point system in which various infractions of company policy would be assigned various points and employees would be terminated if their point total exceeded 10. Employees would have points removed if they went set periods of time without incurring any additional points.

As of February 11, 2019, Claimant had no points; however, that day she called Employer stating she could not work due to an illness. Because she did not have sufficient sick time accrued, she was assessed one point. On March 15, 2019, she again called in sick without sufficient sick time, and due to it being a "high volume day," she was assessed two points for the absence.

The next incident occurred on March 25, 2019, when Claimant, according to Employer's records, failed to appear for a work shift and failed to call in about the absence. Employer assigned her 4 points for the matter. Of note, at the hearing, Claimant acknowledged she failed to appear for her

shift, but she testified she left a message, which would reduce the number of points assigned. To corroborate her testimony, she presented a phone record, and while it lacked the year, it does show a date that along with her testimony establish the call was made. The phone record was from her friend's phone, and Employer has no specific evidence to contradict this.

On June 13, 2019, Claimant was assessed an additional point for failing to attend a scheduled shift with no reason provided to employer. This put her at eight points, and she was issued a final written warning shortly thereafter.

With the passage of time, some of the points began to roll off, but on December 5, 2019, Employer again assessed Claimant a point for failing to attend a shift, with no specific information provided beyond the absence was for personal reasons. While another point did also roll off, she secured another half point for failing to clock-in for a shift she worked on March 13, 2020.

The final incident occurred on August 8, 2020, when Claimant was assessed four points for failing to arrive timely for a scheduled shift and failing to timely call the Employer. At this point, Claimant had 10.5 points, and Claimant's employment was terminated on August 10, 2020.

Claimant subsequently filed for unemployment insurance benefits, and in a November 4, 2020, decision, the Department denied unemployment insurance benefits for excessive unexcused absenteeism after being warned. Smith appealed, and on appeal, she argues she did not engage in misconduct in part because her actions are not egregious enough and because she would not have been at 10 points had Employer assessed her the appropriate number of points for the March 25, 2019, incident. She also generally challenges some of the other points, and in response, Employer stands on its point system, noting the policy was provided to her when she began working.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

"The purpose of [Iowa's] unemployment compensation law is to protect from financial hardship workers who become unemployed through no fault of their own." Bridgestone/Firestone, Inc. v. Employment Appeal Bd., 570 N.W.2d 85, 96 (Iowa 1997). As a result, the governing employment provisions "should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." Cosper v. Iowa Dept. of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

As part of the statutory framework, an individual is disqualified from receiving unemployment benefits when he or she has been discharged for "misconduct." Iowa Code § 96.5(2). "Misconduct" is defined by the governing regulations to be "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." 871 Iowa Administrative Code § 24.32(1)(a); see also Freeland v. Employment Appeal Board, 492 N.W.2d 193, 196 (Iowa 1992) (noting that "the agency rule definition is an accurate reflection of legislative intent"). In explaining what this means, the governing regulation states:

> 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 I.A.C. § 24.32(1).

The governing regulation provides further guidance on when absenteeism can rise to the level of misconduct. It states: "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." Id. § 24.32(7). For absenteeism to constitute misconduct under this rule, it first must be excessive, which is determined by looking at the length and number of instances leading to the termination as well as the "past acts and warnings" related to being absent. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187, 192 (Iowa 1984). Generally speaking, a single instance of absenteeism will not be sufficient to be construed as misconduct. Irving v. Employment Appeal Bd., 883 N.W.2d 179, 201 (Iowa 2016).

Absenteeism must also be "unexcused" to be construed as misconduct, which occurs when the reason for absence is unrelated to either an illness or other reasonable grounds or is unreported. Cosper, 321N.W.2d at 10. In interpreting what this means, courts have held absenteeism resulting from "personal problems or predicaments," such as oversleeping, car trouble, and difficulties with baby sitters, do not form the basis of reasonable grounds to be missing, but other conditions more involuntary in nature, such as individual being arrested and detained for a crime he or she did not commit, can be the basis of reasonable grounds. Irving, 883 N.W.2d 179. The reporting requirement is also situationally dependent, such as when an individual delays reporting an absence due to being incapacitated in a hospital. Id., 883 N.W.2d at 200-01 (reviewing case law).

Importantly, "[m]isconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits." Henry v. Iowa Dept. of Job Service, 391 N.W.2d 731, 734 (Iowa App. 1986). In fact, "[w]hat constitutes misconduct justifying termination of an employee, and what is misconduct which warrants denial of unemployment benefits are two separate decisions." Brown v. Iowa Dept. of Job Service, 367 N.W.2d 305, 306 (Iowa App. 1985). By statute, "[t]he employer has the burden of proving a claimant is disqualified for benefits." Bartelt v. Employment Appeal Bd., 494 N.W.2d 684, 686 (Iowa 1993) (citing Iowa Code § 96.6(2)). Finally, "[w]hile 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." 871 I.A.C. § 24.32.

In this case, the Department's decision must be set aside. As an initial matter, Claimant did not quit her position; instead, her employer was terminated on August 10, 2020, for exceeding 10 points on the disciplinary scale. The triggering event for the termination was the failure to timely arrive for a work shift and notify Employer of her tardiness on August 8, 2020. Given the lapse of time between the events in August and the other matters for which Claimant was assessed points, the only "current act" upon which misconduct could be found is the August 8, 2020 incident. The prior alleged incidents are "past acts" relegated to only "determining the magnitude" of the failure to timely arrive and notify the Employer on August 8, 2020.

On balance, the failure to timely arrive for a work shift and notify the Employer of the lateness on August 8, 2020, does not meet the fairly stringent definition of misconduct. First, Claimant's conduct on August 8, 2020, standing alone is not sufficiently egregious to warrant a finding of misconduct because it has long been held a single instance of absenteeism is virtually never able to establish misconduct and there is nothing about arriving late for a work shift for ordinary work at a casino that makes this case so exceptional that it justifies a different holding. See Irving, 883 N.W.2d at 201. Indeed, the governing law requires "excessive unexcused absenteeism," which requires a pattern of the conduct and not a single incident. 871 I.A.C. § 24.32(7).

Second, even in the context of the other conduct giving rise to points, the August 8, 2020, incident is not sufficient to establish misconduct. Since missing work due to reported illness is specifically identified as not misconduct under the law, the February 11, 2019, and March 15, 2019, incidents of call in sick have no significance as to whether misconduct occurred. Likewise, the half point for failing to appropriately clock-in on March 13, 2020, is not an absenteeism issue, and as such, it had no material bearing on the analysis. Further, because the record indicates that Claimant left a message about her being unable to attend her shift on March 25, 2019, she is left with essentially unexcused absences on March 25, 2019, June 13, 2019, and December 5, 2019. While a pattern of three absences prior to a final incident can often be a sufficient pattern to establish misconduct, this case is different because of the passage of time. The final event was on August 8, 2020, which is nearly 8 months after the last known tardiness issue. With such a gap, it cannot be concluded this conduct was an "intentional disregard of the duty owed by the claimant to the employer." IA-ADC 871-24.32(7).

There would likely be a different answer if the separation had occurred in December of 2019, but it did not. With the passage of time, the significance of any past act of absenteeism diminishes. The fact Employer's manual required a separation also does not change this because, even apart from the record made at the hearing not supporting a finding of 10.5 points, the issue is not whether a handbook required termination. The issue is whether the definition of misconduct was established, and it has not been. Accordingly, the Department's decision must be REVERSED.

DECISION:

The November 4, 2020 (Ref 01) unemployment insurance decision is REVERSED. Claimant is eligible to receive benefits. Any benefits claimed and withheld on this basis shall be paid.

Jonathan M. Gallagher
Administrative Law Judge

1/26/2021

Decision Dated and Mailed

LEL/lb

Cc: Jill Smith, Claimant (By mail)
Mystique Casino, Employer (By mail)
Nicole Merril, IWD (By email)
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