IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

AUTUMN L DION Claimant **R C CASINO LLC** Employer	**APPEAL 17A-UI-08833-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 02/19/17** **Claimant: Appellant (1)**

Iowa Code § 96.6(2) – Timeliness of Appeal

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

Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 9, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on September 26, 2017. The claimant participated personally. Jacqueline Dion, sister of claimant, and Bryson Jones, nephew of the claimant, also testified. The employer participated through Sara Minard, human resources. Department Exhibit D-1, Employer Exhibit A, and Claimant Exhibits B and C were admitted into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is the appeal timely?
Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a table games dealer, and was separated from employment on October 10, 2016, when she was discharged for excessive absenteeism after being warned. The employer has a written no fault attendance policy, which was provided to the claimant upon hire, that designates a point value to attendance infractions, regardless of reason for an absence or tardy. Upon receipt of 10 points in a rolling twelve month period, an employee can be discharged. A doctor's note will not excuse an absence but can reduce the points incurred. The employer also allocates higher point values to attendance infractions related to weekends and holidays (due to the employer casino experiencing busy times) and also, an extra ½ point is added if an employee fails to properly report an absence three hours in advance. On September 25, 2016, the claimant received a written warning for being at four points.

The claimant injured her hand on July 30, 2016, and reported it to the employer on July 31, 2016 (Employer Exhibit A). She refused medical care or first aid from the employer for the incident.

The claimant received points for being tardy on August 1, 26, September 16, 28, and October 3, 2016. The claimant attributed the tardies to oversleeping, "making a mad dash" to get to work, and once she believed she had been at the emergency room. The claimant was absent on September 18, 2016, but did not properly report her absence, when she called off due to stomach issues. The claimant was also absent on October 1, 2016, which was a weekend and did not properly report her absence, so she did receive additional points. The final incident occurred on October 8, 2016, which was Columbus Day. The claimant went to a doctor on a reservation eight hours from Davenport on October 7, 2017, (Claimant Exhibit C). She finished her doctor's appointment that afternoon at approximately 4:30 p.m. She worked at 6:00 p.m. on October 8, 2017, and stayed overnight with her driver. The claimant stated her driver was tired and also wanted to see her grandmother while on the reservation. The claimant called the employer at 11:35 a.m. to report she would be absent for her 6:00 p.m. shift that evening. Consequently, she pointed out. The claimant arrived back to town during her shift but did not report to work. Even if she had arrived late but worked her shift, she would not have incurred enough points to push her at the ten point threshold for discharge. She was subsequently discharged.

An initial unemployment insurance decision resulting in disqualification was mailed to the claimant's last known address of record on June 9, 2017. She received the decision within the appeal period. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by June 19, 2017. The claimant stated she wrote an appeal on a small piece of tablet paper and mailed it on June 18 or 19, 2017. The appeal was never received. The claimant waited to hear back from Iowa Workforce Development for approximately two months before making contact. Upon learning her appeal had not been received, she filed a second appeal on August 28, 2017, online (Department Exhibit D-1).

REASONING AND CONCLUSIONS OF LAW:

The first issue to be addressed is whether the claimant's appeal can be accepted as timely.

Iowa Code section 96.6(2) provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5,

> subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from unemployment insurance decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep’t of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep’t of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp’t Sec. Comm’n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp’t Sec. Comm’n*, 212 N.W.2d 471, 472 (Iowa 1973).

In this case, the claimant made a good faith effort to file an appeal (by mail) in a timely manner but it was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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 establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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 Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). Absences due to illness or injury **must be properly reported in order to be excused.** *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). (Emphasis added).

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 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*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

In the specific context of absenteeism the administrative code provides:
Iowa Admin. Code r. 871-24.32(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.

871 IAC 24.32(7); *See Higgins v. IDJS*, 350 N.W.2d 187, 190 n. 1 (Iowa 1984)("rule [2]4.32(7)…accurately states the law").

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be unexcused. *Cosper v. IDJS*, 321 N.W.2d 6, 10(Iowa 1982). Second, the unexcused absences must be excessive. *Sallis v. Employment Appeal Bd*, 437 N.W.2d 895, 897 (Iowa 1989). The administrative law judge is persuaded the claimant was aware of the employer's point system attendance policy, which designated point values for attendance infractions, and increased point values for improper reporting of absences and absences on weekends and holidays. The claimant's five absences (tardies) were primarily attributed to oversleeping/running late, which would be unexcused. The claimant had one absence for unknown reasons that she did not properly report, and because it was not properly reported, (regardless of reason), it would be considered unexcused. The claimant's absence due to stomach issues could be considered excused as the claimant may not have had hours' notice to properly report.

The claimant's final absence occurred on October 8, 2017, when the claimant sought medical care eight hours away and then spent the night the following day on the reservation, instead of coming back and going to work. Even if the claimant was reliant upon a ride, she acknowledged she arrived back to town during her shift time and could have worked a partial shift, which would have prevented her exceeding attendance points or pointing out. The claimant's reporting of her absence almost seven hours in advance was proper notice but did not reflect intent to try and preserve her job and not for a reason that would be considered excused. The administrative law judge concludes the final absence was also unexcused. Therefore, the claimant had seven unexcused absences and one excused absence.

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007). In this case, the claimant had seven unexcused absences in less than three months. This is clearly excessive.

Based on the evidence presented, the employer has credibly established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The June 9, 2017, (reference 02) unemployment insurance decision is affirmed. The claimant filed a timely appeal. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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