IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

LATRESE I TAYLOR Claimant **RIVERSIDE CASINO AND GOLF RESORT** Employer	**APPEAL 16A-UI-01547-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/10/16** **Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 3, 2016, (reference 01) unemployment insurance decision that denied benefits based upon her discharge. The parties were properly notified of the hearing. A telephone hearing was held on March 30, 2016. The claimant Latrese Taylor participated and testified. The employer Riverside Casino and Golf Resort participated through human resource business partner, Anna Hessong.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to the employer or did employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a table games supervisor from December 23, 2013, until this employment ended on January 13, 2016.

The employer has a no-fault attendance policy that is based on the accumulation of points within a rolling calendar year. Under the policy employees accumulate a half a point each time they are tardy or leave early, one point for absences during weekdays, two points for absences on weekends, and two and a half points for absences on holidays or during special events. At four points employees receive written coaching. Employees receive a written warning at six points, a final written warning at eight points, and are subject to termination at ten points. Department managers do have discretion to remove points as they deem appropriate.

By December 22, 2015, claimant had been late to work 17 times during the rolling calendar year. Each of these tardies were related to issues with childcare. On November 23, 2015, claimant received a final written warning advising her that if she accumulated two more points her employment would be terminated. Claimant was late to work several times in January, which caused her to accumulate additional points.

On January 12, 2016, claimant was going to be late to work again due to issues with childcare. Claimant knew her tardy would put her at ten points for the rolling calendar year, so she called in reporting that she would not be in at all. The following day, January 13, director of table games, Jodi Radosecich, called claimant to talk about her attendance situation. Radosecich asked claimant if she still wanted her job and informed her that sometimes they are able to work with people on their points. Radosecich told claimant that if she had just talked to her the previous day, she likely would have removed the half point for being tardy. Claimant told Radosecich that she was not interested in returning to her job because it was too stressful to be so high in points. After the conversation, claimant assumed she had been terminated and did not return to work. No one ever told claimant she had been terminated. Hessong believed it was Radosecich's intent to attempt to work with claimant to retain her job, even though she should have been terminated in accordance with the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was not discharged but voluntarily left the employment without good cause attributable to employer.

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.

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).

Iowa Code § 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2) (amended 1998). Generally, when an individual mistakenly believes they are discharged from employment, but was not told so by the employer, and they discontinue reporting for work, the separation is considered a quit without good cause attributable to the employer. *LaGrange v. Iowa Dep't of Job Serv.,* (No. 4-209/83-1081, Iowa Ct. App. filed June 26, 1984).

Claimant knew she was going to be late to work on January 12 and that this tardy would put her at ten points. Claimant therefore decided to call off for the entire day, putting her over ten points. When Radosecich reached out to the claimant the following day to see if she was interested in staying her position claimant indicated she was not and assumed she had been terminated based on her attendance. Claimant did not return to work again. Hessong believed it was Radosecich's intention to retain claimant as an employee. Since claimant did not follow up with Radosecich or other management personnel, and her assumption of having been fired was erroneous, the failure to continue reporting to work was an abandonment of the job. Benefits are denied.

Even if claimant was correct in her assumption that she had been terminated, she is still ineligible for benefits based on her excessive tardiness. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10.

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).

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to

work. The claimant was late more than 17 times in a rolling calendar year. All of claimant's tardies were due to issues with her childcare. Claimant was warned on November 23, 2015, that the accumulation of two more points would lead to termination. Claimant had additional tardies in January 2016, which lead her to accumulate ten points by January 13, 2016. The employer has established that the claimant was warned that further improperly reported unexcused tardies could result in termination of employment and the final tardy was not excused. The final tardy, in combination with the claimant's history of unexcused tardies, is considered excessive. Benefits are withheld.

DECISION:

The February 3, 2016, (reference 01) unemployment insurance decision is affirmed. Claimant voluntarily left the employment without good cause attributable to the employer. In the alternative, even if claimant had not voluntarily quit, the employer has established that she was discharged from employment due to excessive, unexcused absenteeism. 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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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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