

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

PHILLIP L PATE
Claimant

R C CASINO LLC
Employer

APPEAL 15A-UI-05340-EC-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 04/12/15
Claimant: Appellant (1)

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/appellant, Phillip Pate, filed an appeal from the May 1, 2015, (reference 01) unemployment insurance decision that denied benefits based upon his discharge from employment for repeated tardiness. The parties were properly notified about the hearing. A telephone hearing was held on June 10, 2015. The claimant participated. The employer, R C Casino LLC, participated through Jason True, Director of Human Resources. The employer submitted exhibits which were labeled as Exhibit E and were admitted into the record without objection.

ISSUE:

Was the separation from employment a discharge for 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 buffet cook from April 1, 2010, until this employment ended on April 17, 2015, when his employment was terminated due to multiple absences in violation of the employer's attendance policy.

The claimant was discharged from employment due to a final incident of absenteeism that occurred on April 11, 2015, immediately following an incident on April 10, 2015. He was most recently warned on April 4, 2015, that he faced termination from employment upon accumulation of one more point due to any more incidents of unexcused absenteeism. Prior absences and warnings are listed below.

The claimant worked the day shift in the buffet restaurant of a casino. He was generally responsible for opening the buffet for customers each morning. His shift typically started at 7:00 a.m. or 8:00 a.m. His work schedule was posted on the wall, for the next one and a half weeks. The schedule changed from time to time. Employees were expected to look at the schedule ahead of time and often. The claimant did not check the posted schedule on a regular basis to learn if his schedule changed.

The casino is connected to the parking lot by a skywalk, which allows employees to avoid the train tracks nearby.

The employer has an attendance policy which assesses points for absences and tardiness on a rolling twelve-month basis. This attendance policy includes progressive discipline for accumulating points through absences and tardiness. An accumulation of ten points in a twelve-month period results in termination. The claimant was aware of this point system and the consequences of repeated violations of the attendance policy.

This employer's attendance policy had a zero tolerance for tardiness, counting one minute late as tardiness, assessed as one-half point. An absence was assessed one point.

The claimant received several written warnings for violations of the attendance policy. On February 26, 2014, he received a first warning after he accumulated 5.5 points. On September 5, 2014, he received a final warning after he accumulated 9 points. On January 27, 2015, he received a second warning after he accumulated 6 points. On March 20, 2015, he received a second warning after he accumulated 6 points. On April 4, 2015, he received a final warning after he accumulated 9 points. Then, he was tardy on April 10, 2015, and again on April 11, 2015. At the time, the claimant did not provide a reason for his tardiness on these two occasions. On April 17, 2015, his employment was terminated under the employer's attendance policy because he accumulated ten points within a twelve-month period.

During the hearing, the claimant provided reasons for some of his failures to report for work on time as scheduled. On January 5, 2015, his schedule had changed and he did not know that fact ahead of time. He was more than an hour late to work that day. On January 22, 2015, he was seven minutes late because of a train. On March 6 and again on March 7, 2015, he was more than an hour late for his scheduled shift. On March 27, 2015, he was absent because his wife had a heart attack. On March 28, 2015, he arrived at work on time, but forgot to punch the time clock right away. He did not provide a reason for his last two incidents of tardiness, which resulted in his termination.

REASONING AND CONCLUSIONS OF LAW:

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

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 Admin. Code r. 871-24.32(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.

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.

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 evidence presented here clearly shows multiple warnings for absences and tardiness. The claimant was aware of the attendance policy. He knew or should have known to regularly check the posted schedule. He knew or should have known that he should use the skywalk to avoid any delays caused by a train.

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).

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. An employer is entitled to expect its employees to report to work as scheduled or to be notified in a timely manner as to when and why the employee is unable to report to work. The employer has credibly established that claimant was warned, repeatedly, that further unexcused absences or tardiness could result in termination of employment. The two final limited absences, tardiness, were not excused. The final absences, in combination with claimant's history of unexcused absenteeism, are properly considered excessive. Benefits are denied.

DECISION:

The May 1, 2015, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Emily Gould Chafa
Administrative Law Judge

Decision Dated and Mailed

ec/pjs