

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHANTAL MYERS**  
Claimant

**APPEAL NO. 10A-UI-00164-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RIVERSIDE CASINO AND GOLF RESORT**  
Employer

**OC: 11/15/09**  
**Claimant: Appellant (2)**

Section 96.5-2-a - Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated December 22, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on March 1, 2010, in Cedar Rapids, Iowa. Claimant participated. Employer participated by Trisha Murphy, human resources business partner; Ashley Hubbs, human resources benefits specialist; and Mike Bose, pit manager. The record consists of the testimony of Trisha Murphy; the testimony of Ashley Hubbs; the testimony of Mike Bose; the testimony of Chantal Myers; and Employer's Exhibits 1-8.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**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 a casino located in Riverside, Iowa. The claimant was hired on August 15, 2006, as a full-time dealer. She was terminated on October 20, 2009, for excessive absenteeism.

The employer has a no-fault point system for attendance. If an employee reaches ten points within a rolling twelve-month calendar, the employee is terminated. The number of points given to a particular absence depends on when the absence occurred and whether there was proper notification. An employee is required to call in three hours prior to a scheduled shift if he or she is going to be absent. In addition, points can be rolled back if an employee qualifies for FMLA leave or for other excused absences.

Through September 3, 2009, the claimant had accumulated 4.5 points. She was then absent on September 9, 2009; September 10, 2009; September 11, 2009; and September 12, 2009. As a result she reached 10.5 points. However, the claimant had applied for FMLA leave and while

that application was pending, she continued to work since FMLA leave would have rolled back her points.

The claimant applied for FMLA leave on September 24, 2009. She had a due date of October 9, 2009, to return her paperwork. The claimant was given several extensions, with the final due date being October 19, 2009. Ms. Hubbs, the human resources assistant who processed and approved FMLA leave, did not get the paperwork until October 20, 2009. The doctor's information is sketchy, but he dated the commencement of her condition to September 10, 2009 and said she could not work for three days. The physician also said that the claimant was able to perform her job functions. No followup treatment appointment or reduced work schedules were needed.

The claimant was tardy on September 23, 2009; was absent on September 26, 2009; and was then absent on October 15, 2009; October 16, 2009; and October 17, 2009. At this juncture she was at 20.5 points and was terminated as of October 20, 2009. The claimant's last contact with the employer was on October 15, 2009. She called then to say that her son was ill with the flu. The employer was providing excused leave for flu, but all employees were still required to call in everyday to report their absence. The claimant made no inquiries about her job until sometime in November when another dealer told her that she was no longer on the schedule.

#### **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.

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 or in repeated acts of carelessness or negligence. Excessive absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness. Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The record in this case shows that the claimant was excessively absent. The more difficult issues are which absences led to the claimant's termination and whether the claimant properly notified the employer. The employer had a point system for attendance. This was characterized as a "no-fault" system, which meant that all absences were assigned points. However, points could be rolled back in certain circumstances, such as FMLA approval. On September 3, 2009, the claimant was at 4.5 points. She exceeded ten points as a result of absences on September 9, 2009; September 10, 2009; September 11, 2009; and September 12, 2009. The reason she was absent was that she had a kidney infection. She notified her employer about her absence.

Although the claimant was ill and properly notified her employer, she had exceeded her ten points with this four-day absence. In order to get some of those points rolled back, she needed to have approved FMLA leave. This FMLA leave was not approved. As a result, no points were rolled back and the claimant was terminated on October 20, 2009. This is the date that the FMLA leave was denied.

The administrative law judge concludes that the claimant's termination for excessive absenteeism occurred because those four days of absence back in September 2009, were not rolled back when the FMLA leave was denied. Although the claimant was absent from October 15, 2009, on, and those absences were not excused because the claimant failed to adhere to the employer's notification policy, those absences were not the reason the claimant was terminated. The claimant's absences from September 8, 2009, through September 12, 2009, were for personal illness and were properly reported. Under Iowa law, those absences are excused, even if the employer denied FMLA leave for those days.

Because the employer has not shown excessive unexcused absenteeism, benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated December 22, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs