

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEANA M ZELENY
Claimant

APPEAL NO. 09A-UI-08075-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS BR MANAGEMENT CO INC
Employer

OC: 03/22/09
Claimant: Appellant (2)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated May 21, 2009, reference 03, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 22, 2009. Claimant participated. Employer participated by Tonya Achenbach, Senior Employee Relations Specialist. The record consists of the testimony of Tonya Achenbach and the testimony of Jeana Zeleny.

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 claimant was originally hired as a housekeeper on May 5, 2008. She then transferred to the Horseshoes Casino on December 16, 2008, where she worked as a part-time cashier at the buffet. The employer has a written attendance policy, which was explained to the claimant at orientation and emphasized by management thereafter. The attendance policy is a no-fault policy. If an employee accumulates ten points during a 12-month period, termination is automatic. One-half point is assigned for tardiness and one point for not coming to work.

The claimant accumulated ten points on January 10, 2009, when she was given one-half point for being tardy. However, the employer did not terminate her then since there had been some miscommunication concerning her point status. Instead she was given a final written reminder on January 16, 2009. In that written reminder she was told that if there was any further attendance infraction she would be subject to immediate separation.

The claimant was late on March 14, 2009, and was given one-half point. Because she had violated the attendance policy at that juncture, she was terminated. The reason that the claimant was late on March 14, 2009, was due to personal illness.

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.

871 IAC 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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

Excessive unexcused absenteeism is one form of misconduct that can disqualify an individual for unemployment insurance benefits. However, the absences, which include tardiness, must be both excessive and unexcused. In addition, the final instance must be unexcused, even if the prior attendance violations were also unexcused. The Iowa Supreme Court has held that there is a level of absenteeism which is not excessive and therefore not misconduct under Iowa unemployment insurance law. Sallis, supra, at 897.

This case turns on the fact that the final incident which led to the claimant's termination was an excused absence as it was due to illness. The claimant testified that she suffers from a chronic intestinal disorder and was late because symptoms from that disorder. Under these circumstances, the final instance of tardiness is excused and therefore the claimant is entitled to benefits if she is otherwise eligible.

DECISION:

The decision of the representative dated May 21, 2009, reference 03, is reversed. Unemployment insurance benefits are allowed provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css