

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TIFFANY S BEAR
Claimant

APPEAL NO. 13A-UI-12209-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**SAC & FOX TRIBE
MESKWAKI BINGO CASINO & HOTEL**
Employer

**OC: 09/29/13
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

Section 96.3-7 – Recovery of Overpayment of Benefits, Employer participation at Fact Finding

STATEMENT OF THE CASE:

Meskwaki Bingo Casino & Hotel (employer) appealed a representative's October 21, 2013, decision (reference 01) that concluded Tiffany Bear (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 21, 2013. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Lucie Roberts, Human Resources Director, and Brian Ehrig, Executive Chef. The employer offered and Exhibit One was received into evidence. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on November 18, 2009, as a full-time cook. The claimant signed for receipt of the employer's handbook on November 18, 2009. The employer issued the claimant a Performance Improvement Plan on April 25, 2011. The plan listed the employer's levels of discipline. On August 5, 2013, the employer issued the claimant a verbal warning for accumulating six attendance points. The employer's policy indicates that an employee who accumulates twelve attendance points in a rolling twelve-month period will be subject to termination. During the claimant's employment she was tardy six times, absent for personal reasons twice, and absent for medical issues seven times. On September 16, and 17, 2013, the claimant did not appear for her shift and did not notify the employer of her absence. Later on September 17, 2013, the claimant notified the employer she was not coming to work but had a doctor's note. On September 18 and 19, 2013, and after, the claimant did not appear for work, notify the employer of her absence, or provide a doctor's note for her absences. The claimant had accumulated more than twelve points. The employer terminated the claimant.

The claimant filed for unemployment insurance benefits with an effective date of September 29, 2013. She received \$2,090.00 in benefits after the separation from employment. The employer participated at the fact-finding interview on October 18, 2013.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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(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 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 Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. The employer has 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.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The claimant has received unemployment insurance benefits that she was not entitled to receive. The employer participated personally in the fact-finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

DECISION:

The representative's October 21, 2013, decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant has received unemployment insurance benefits that she was not entitled to receive. The employer participated personally in the fact-finding interview and is not chargeable. The claimant is overpaid unemployment insurance benefits.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs