IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

HUY M LE
4212 S 37TH ST
OMAHA NE 68107

HARVEYS IOWA MANAGEMENT CO INC
HARRAHS COUNCIL BLUFFS CASINO
1 HARVEYS BLVD
COUNCIL BLUFFS IA 51501

Appeal Number: 05A-UI-01625-JTT
OC: 01/16/05 R: 12
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Huy Le filed a timely appeal from the February 10, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 7, 2005 and concluded on April 5, 2005. Mr. Le participated in the hearing with the assistance of interpreter Wenn Pham, and presented additional testimony through Melissa Le. The employer was represented by Tonya Achenbach, Senior Employee Relations Representative, who provided additional testimony through James Reber, Executive Sous Chef.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Huy Le was employed as a full-time lead cook from July 13, 2002 until January 16, 2005, when James Reber, Executive Sous Chef, terminated his employment based on alleged job abandonment.

The employer utilizes a "no-fault" attendance policy under which employees are subject to discharge if they accrue 10 attendance points within a rolling 12-month period. All absences are counted unless the employee has been granted a leave of absence. Employees apparently accrue 2 points for a no-call/no-show. Absences for weekend shifts, i.e. the employer's busiest days, accrue double points. An employee must contact his supervisor at least two hours prior to the scheduled start of the shift. The attendance policy is contained in the employee handbook. Mr. Le signed an acknowledgment of receipt of the handbook on August 14, 2003 during his orientation.

The history of Mr. Le's absences during the 12-month period prior to the absence on January 14, 2005 that prompted his termination is as follows: Mr. Le called in absences on August 14, 2004, December 11 and 13, 2004, January 3, 2005. The employer has no record regarding whether these absences were due to illness or matters of personal responsibility. In addition, there are no records to indicate Mr. Le failed to report these absences at least two hours prior to the scheduled start of his shift.

The final absence that prompted Mr. Reber to decide to terminate Mr. Le's employment occurred on Friday, January 14, 2005, when Mr. Le accrued four attendance points for a no-call/no-show for a weekend shift. Mr. Le had received a written warning on December 16, 2004, for having accrued six attendance points and received an additional point when he called in on January 3, 2005. On the morning of Saturday, January 15, 2005, Mrs. Le contacted Mr. Reber at or before Mr. Le's 8:00 a.m. scheduled start time and advised that Mr. Le would not be in due to illness. The employer considered Mr. Le's absence on January 15 to be a second no-call/no-show because Mr. Le did not personally contact the employer and the call from Mrs. Lee came in less than two hours prior to the scheduled start of Mr. Le's shift. Mrs. Le explained that neither she nor Mr. Le had contacted the employer the previous day because they did not have a telephone. Though Mr. Reber did not explicitly tell Mrs. Le that Mr. Le was terminated, Mr. Reber did advise Mrs. Le that Mr. Le had accumulated all of the points he could accumulate and that his absence on January 14 was a "terminable offense." Mrs. Le conveyed this information to Mr. Le, who concluded that he had been terminated. After the absence on January 14, Mr. Reber decided that Mr. Le would be formally discharged the next time he appeared for a shift.

Mr. Le returned to the place of employment on January 16 with the intention of requesting another chance. Upon arriving at that workplace, Mr. Le spoke with a co-worker, who confirmed that Mr. Le had already been terminated. Mr. Le did not wait to speak with his supervisor, but chose instead to leave the workplace.

REASONING AND CONCLUSIONS OF LAW:

The employer characterized Mr. Le's separation from the employment as a voluntary quit based no-call/no-show for three consecutive shifts. This argument fails for a number of reasons. In order for a claimant to be deemed to have voluntarily quit due to three consecutive no-call/no-show, the employer must prove it had a written policy to that effect. See 871 IAC 24.25(4). The employer's witnesses provided no proof of such a policy during the hearing. In addition, the argument fails because Mr. Le was not a no-call/no-show on either January 15, when his wife notified the employer of the absence, or on January 16, when he actually went to the workplace. See 871 IAC 24.25(4).

Mr. Reber's testimony that he never explicitly said to Mrs. Le that Mr. Le had been terminated is duly noted by the administrative law judge. However, the applicable test is whether a reasonable person in Mr. Le's circumstances could have concluded that he had been discharged. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that a reasonable person in Mr. Le's circumstances could have concluded, and would have concluded, that he had been discharged. Mr. Le had been recently warned regarding his point accumulation under the employer's attendance policy. Mr. Le received information from Mr. Reber, via Mrs. Le, that he committed a "terminable offense" and/or that he had in fact been fired. When Mr. Le arrived at the workplace on January 16, his co-worker confirmed that his employment had already been terminated. Accordingly, the administrative law judge concludes that Mr. Le was discharged.

The remaining question is whether the evidence in the record establishes that Mr. Lee's discharge was for misconduct based on excessive unexcused absences.

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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Mr. Le's absences to constitute misconduct that would disqualify him from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as lack of transportation and oversleeping are

considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lee's absence on January 14 was an unexcused absence. Though the absence was based on illness, Mr. Le did not comply with the employer's policy regarding notifying the employer of the absence. The administrative law judge concludes that Mr. Le's absence on January 15 was also an unexcused absence because the employer was not notified at least two hours prior to the start of the shift as required under the employer's policy. The administrative law judge concludes that all of Mr. Le's prior absences were excused because the employer has failed to prove by a preponderance of the evidence that they were unexcused. Despite the fact that Mr. Le's absences on January 14 and 15 are deemed unexcused because Mr. Le failed to properly notify the employer, the administrative law judge cannot disregard the fact that the absences were due to illness. In light of these circumstances, the administrative law judge concludes that these two unexcused absences were not excessive. See 871 IAC 24.32(7). Accordingly, Mr. Le is eligible for benefits, provided he is otherwise eligible.

DECISION:

The representative's decision dated February 10, 2005, reference 01, is reversed. The claimant was discharged from his employment for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements.

jt/sc