IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

SADIE PETRY Claimant **AMERISTAR CASINO CO BLUFFS INC** Employer	**APPEAL 15A-UI-12892-JP-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 10/25/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 17, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on December 9, 2015. Claimant participated. Employer participated through representative, Malia Maples and team relations, manager Tammy Denman.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a front desk agent from September 1, 2015, and was separated from employment on October 23, 2015, when she was discharged.

The employer has an attendance expectation policy that expects employees to work their scheduled shift. The employer gives supervisors latitude in disciplining employees under the policy. The employer does follow a progressive discipline policy that calls for a verbal warning, then a written warning, then a last and final warning, and finally discharge. Employees are required to call in before their shift begins if they are going to be absent.

On October 23, 2015, claimant was told by her supervisor she was discharged because of her absences. Claimant had been absent from work on October 15, 16, 17, 18, 19, 22, and 23, 2015, because she was ill. For each absence, claimant followed the employer's call-in procedure and reported her absences. Claimant told the employer she was too ill to work.

Claimant also informed the employer she had a doctor's appointment on October 16, 2015. The employer did not request a doctor's note when claimant would report these absences. Claimant's illness was not work related. Claimant did have a doctor's note for her absences and was going to bring it to the employer when she returned to work.

On October 23, 2015, claimant had two conversations with her supervisor. The first conversation, claimant was still waiting to hear back from her doctor about some test results that would tell her what the next steps would be for her treatment. Claimant's supervisor told her to wait until she heard back from her doctor and then she should contact human resources. Before claimant heard back from her doctor, her supervisor called and told her she had spoken with human resources and she was being discharged. The supervisor did give claimant the option to resign so she would be eligible for rehire in ninety days.

Claimant had missed three days prior to October 15, 2015 for illness and followed the call-in procedure for both days. Claimant did show a supervisor a doctor's note for these absences. Claimant had no prior disciplinary warnings.

Around October 30, 2015, claimant was able to go back to work because she started feeling better. Claimant's doctor told her she could go back to work once she started feeling better. Claimant has been looking for a job since October 30, 2015. Claimant has been applying for jobs twice a week starting around October 30, 2015. Claimant is not under any work restrictions by a doctor.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may

infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and experience. Claimant presented direct, first-hand testimony while the employer relied upon second-hand reports; the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The first issue that must be decided is whether claimant resigned from employment or was discharged by her supervisor during a phone call on October 23, 2015. Claimant presented direct, first-hand testimony that her supervisor told her she was discharged during the phone call and that she did not resign. The employer did not present any direct, first-hand testimony to rebut claimant's testimony. For these reasons and the reasons stated below, claimant did not quit, but was discharged by her supervisor on October 23, 2015.

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(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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law." The

requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. 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, supra.*

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct. A failure to report to work without notification to the employer is generally considered an unexcused absence. Because claimant's absences were otherwise related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

The employer has not established that claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Claimant was absent from work on October 15, 16, 17, 18, 19, 22, and 23, 2015, because she was ill. For each absence, claimant followed the employer's call-in procedure and reported her absences and that they were related to an illness. On October 23, 2015, claimant had two conversations with her supervisor. During the first conversation, claimant's supervisor told her to wait to call human resources until after she spoke with her doctor. Before claimant spoke with her doctor, claimant's supervisor called her. During this second phone call, claimant's supervisor told her that the supervisor had already spoken with human resources and that claimant was being discharged for absenteeism. The employer's argument that claimant resigned during this phone call and was not discharged is not persuasive. Claimant presented direct, first-hand testimony that her supervisor told her she was discharged during the phone call and that she did not resign. The employer did not present any direct, first-hand testimony from the supervisor to rebut claimant's testimony.

Because claimant's last absence was related to properly reported illness, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

Furthermore, inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The November 17, 2015, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld based upon this separation shall be paid to claimant.

_____
Jeremy Peterson
Administrative Law Judge

_____
Decision Dated and Mailed

jp/css