

**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**

**CONSTANCE J RANKIN  
3866 DODGE ST  
OMAHA NE 68131**

**AMERISTAR CASINO CO BLUFFS INC  
c/o EMPLOYERS UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000**

**Appeal Number: 05A-UI-03169-LT  
OC: 02-13-05 R: 01  
Claimant: Respondent (1)**

**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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Iowa Code § 96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Employer filed a timely appeal from the March 16, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 12, 2005. Claimant did participate and was represented by Joe Basque, Attorney at Law. Employer did participate through Denver Meyer and Elizabeth Aguilera and was represented by Rachel Thompson of Employers Unity. Claimant's Exhibit A was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time slot attendant through December 13, 2004 when she was discharged.

Claimant was on Family Medical Leave Act (FMLA) to take care of her mother effective September 20, 2004 (12 weeks ended December 10, 2004). (Claimant's Exhibit A) On September 23, 2004, claimant's mother's treating physician certified, on the forms provided by employer, the mother's serious illness and claimant's need to care for her but provided no more detail. Elizabeth Aguilera approved the leave on September 27, 2004 without further clarification from the physician.

Claimant's father died on October 19 and employer denied claimant's request for FMLA bereavement leave on October 20 but she was given bereavement pay on October 28, 2004 for 24 hours at \$9.68 per hour. Claimant told Aguilera she would need the full 12 weeks of FMLA because her father passed away and her mother has dementia and could not take care of herself. At no time did claimant tell Aguilera she was waiving the remaining FMLA time approved for her mother's care.

Claimant advised Aguilera she would be coming back to work on December 12 after her normally scheduled days off. Claimant did return to work as of December 12, 2004 and did work a full shift. Aguilera called claimant on December 13th and said she should not have been allowed to return to work and was fired. Aguilera had made no formal request for additional information nor did she give claimant a deadline for submission of additional information from her mother's physician. Claimant had signed an authorization form with the original FMLA paperwork to authorize employer to have access to related medical information.

Claimant called her department every week to let them know she would continue to need the week off and left messages for Aguilera updating her about requests for additional medical information.

#### REASONING AND CONCLUSIONS OF LAW:

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

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

Reported absences related to illness are excused for the purpose of the Iowa Employment Security Act. This also includes absences covered under FMLA. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Because employer gave claimant no written demand or deadline for additional information and claimant was discharged one day after returning to work from her approved FMLA absence period, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The March 16, 2005, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

dml/sc