

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHAD S DITSWORTH
Claimant

APPEAL NO. 09A-UI-10664-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAMOND JO WORTH LLC
Employer

OC: 06/28/09
Claimant: Appellant (1)

Section 96.5-2-a - Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated July 22, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 10, 2009. Claimant participated. Employer participated by Jeff Peterson, human resources director. The record consists of the testimony of Jeff Peterson and the testimony of Chad Ditsworth.

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 worked as a part-time poker dealer for the Diamond Jo Casino in Northwood, Iowa. His date of hire was May 22, 2008. The claimant's employment was terminated on June 26, 2009, for excessive absenteeism.

The employer had a written attendance policy, of which the claimant was aware, that called for termination in the event an employee reached 10 points within a 12-month period. The 12-month period was a rolling calendar, which permitted an employee to drop points if good attendance was achieved. The policy also provided that written notices were given when an employee reached a certain point level. These written notices were given at 4 points and 7 points.

Within the period July 15, 2008, through June 23, 2009, the claimant accumulated 10 ½ points. On April 23, 2009, the claimant was at nine points and he was given a notice of misconduct. A discussion was held with the claimant emphasizing the importance of being at work on time. The claimant was tardy on May 2, 2009, due to car problems and was then at 9 ½ points. He was given a final written warning and placed on probation. He was informed that if he missed any more work that he could be terminated. On June 6, 2009, the claimant had car problems.

On June 23, 2009, the claimant's car broke down and he did not come to work. At this juncture, he exceeded 10 points and the decision was made to terminate him when he came to work on June 26, 2009.

On June 26, 2009, the claimant was again tardy. Before he could start work, his supervisor held a meeting with him and informed him that he was terminated.

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.

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.

The evidence in this case established that the claimant had excessive and unexcused absences in violation of the employer's written attendance policy. Although some of the claimant's attendance points were accumulated as a result of illness, the final three instances were due to car problems. Absences due to matters of personal responsibility, such as transportation problems, are considered unexcused. See Harlan v. IDJS, 350 N.W. 2d 192 (Iowa 1984). The claimant was given numerous written warnings by the employer and put on probation when he reached 9½ points. The claimant knew that his further employment depended on his attendance and he still continued to be late and absent without excuse. The employer established misconduct and benefits are denied.

DECISION:

The decision of the representative dated July 22, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs