

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JUSTIN P HAINLINE**  
Claimant

**APPEAL NO. 10A-UI-15558-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SAC & FOX TRIBE**  
Employer

**OC: 09/19/10**  
**Claimant: Appellant (1)**

Section 96.5-2-A – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated November 1, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 3, 2010. Claimant participated. Employer participated by Mark Fink, Acting Human Resources Director, and Brian Ehrig, Executive Chef. The record consists of the testimony of Mark Fink; the testimony of Brian Ehrig; the testimony of Justin Hainline; Claimant's Exhibit A; and Employer's Exhibits 1-15.

**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 employer owns and operates a casino in Tama, Iowa. The claimant was hired on July 11, 2007. He was a cook in the Steakhouse restaurant, which is part of the casino. The claimant was a full-time employee. The claimant's last day of work was September 18, 2010. He was terminated on September 18, 2010, for excessive absenteeism.

The incident that led to the claimant's termination occurred on September 18, 2010. He was tardy for his scheduled shift by approximately 1½ hours. The reason for his tardiness was that he was "running late." He was "running late" because he could not find a ride to work. The claimant's tardiness put him at 13 points under the employer's attendance policy. If an employee goes over 12 points, termination results unless the final incident is for illness.

The claimant was ill on September 12, 2010, and September 13, 2010. He was tardy on September 10, 2010; August 28, 2010; July 31, 2010; July 21, 2010; July 18, 2010; July 15, 2010; and July 4, 2010. He was absent on August 5, 2010, and failed to notify the employer of his absence within two hours as required by the employer's written attendance policy. The

claimant's tardiness was due to childcare problems and transportation issues. The claimant was given a one-day suspension on August 11, 2010, and July 21, 2010, for attendance violations. He was given a written warning on July 8, 2010, and verbal warnings on July 2, 2010, and April 28, 2010.

## **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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The absenteeism must be both excessive and unexcused. The concept includes tardiness and leaving early. Absence due to matters of personal responsibility such as transportation problems or childcare issues, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). The employer has the burden of proof to show misconduct.

The evidence in this case established excessive unexcused absenteeism. The final incident that led to the claimant's termination was tardiness due to transportation issues. The claimant had seven instances of tardiness from July 4, 2010, through September 18, 2010. He testified

that his tardiness was due to childcare or transportation issues. While it is true that the claimant did have excused absences on September 12, 2010, and September 13, 2010, his unexcused absences exceed his excused absences.

The issue in unemployment cases is not whether the claimant is terminated because he violated the employer's attendance policy. The issue is whether there is excessive unexcused absenteeism. Whether an absence is excused or unexcused is determined under Iowa unemployment insurance law as is the issue of whether absenteeism is excessive. The fact that two of the claimant's absences were excused, that is due to personal illness and properly reported, does not mean that the claimant was not terminated for excessive unexcused absenteeism. The claimant was not terminated for personal illness. Even though his points were exceeded because of personal illness, the employer did not terminate him. Rather his termination occurred when he was absent for personal reasons on September 18, 2010. The employer has shown excessive unexcused absenteeism. Benefits are denied.

**DECISION:**

The decision of the representative dated November 1 2010, 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.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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