

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KEVIN S PETERSEN
Claimant

APPEAL NO. 12A-UI-10918-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEYS CASINO RESORTS
Employer

OC: 08/12/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated August 31, 2012, reference 01, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on October 4, 2012. The claimant participated. The employer participated by Ms. Kristy Easton-Mayhan, operations manager.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Kevin Petersen was employed by Harvey's Casino Resorts from March 27, 2007, until August 15, 2012, when he was discharged for exceeding the permissible number of attendance infraction points allowed under company policy. Mr. Petersen was most recently employed as a table games dealer and was paid by the hour.

Mr. Petersen was discharged on August 15, 2012, after he had accumulated 10.5 attendance infraction points under the company's attendance policy. Employees are subject to discharge if they accumulate 10 infraction points. Mr. Petersen was aware of the policy and had been specifically warned by the employer when he received five points on March 8, 2012; six points on March 31, 2012; and received a final written warning at eight points, which was given to the claimant on April 13, 2012. The final incident that caused the claimant to exceed the permissible number of infraction points incurred on August 8, 2012, when the claimant reported to work late.

The claimant did not dispute the number of infraction points that had been assessed against him when he received each warning and did not dispute the points at the time of discharge. Employees are aware that they can dispute the points by going up the chain of command or requesting a review by the company's employee board of review.

It is the claimant's position that the company miscounted his points and he should not have been discharged.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

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.

The employer has 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. 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 App. 1992).

No aspect of the contract of employment is more basic than the right of an employer to expect an employee will appear at work on the hour and day agreed upon. Recurrent failure to honor that obligation shows a disregard for the employer's interests and standards of behavior and thus may justify a finding of misconduct in connection with the work.

In the incident case, the claimant received a number of warnings from his employer prior to being discharged. The claimant did not dispute the number of attendance infraction points being assessed against him. The points were accessible on the company's computer system and the claimant had the right to dispute the points and/or request a review by the employee review board. Mr. Petersen did not dispute the points assessed against him, either at the time they were given or at the time of his discharge.

Based upon the evidence in the record, the administrative law judge concludes the employer has sustained its burden of proof in showing the claimant was discharged for excessive absenteeism after being warned. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated August 31, 2012, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw