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

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RACING ASSOCIATION OF CENTRAL IOWA DBA PRAIRIE MEADOWS
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Appeal Number: 04A-UI-08123-H2T
OC: 07-11-04 R: 02
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.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct
Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 27, 2004, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on August 19, 2004. The claimant did participate. The employer did participate through Dan Byers, Assistant Director of Human Resources. Claimant's Exhibit A was received. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a casino floor attendant full time beginning August 11, 1997 through July 6, 2004 when he was discharged. The claimant was granted FMLA leave beginning on

May 28, 2004 through July 26, 2004 as is indicated in claimant's exhibit A. The claimant continued to call in throughout the month of May and June, as he had not yet been released to return to work. The claimant was not released to return to work until July 22, 2004 and then he was released to light duty only with no lifting over thirty pounds.

On June 28, 2004, the claimant was sent a letter asking why he had not returned from FMLA leave and was asked to supply more information from his doctor. The information was to be submitted to the employer by July 5, 2004. The letter was sent to the wrong address for the claimant. Before the claimant received the June 28, 2004 letter he received a letter dated July 6, 2004 that informed him he was terminated for job abandonment. The second letter was also sent to the wrong address for the claimant and he did not receive it until July 9, 2004.

The FMLA paperwork submitted by the claimant clearly indicates that he could have leave until July 26, 2004. While the employer was allowed to ask for additional documentation, the employer is required to give the claimant ample time to respond to the request and to address their requests to him at his correct address. The claimant had been following the employer's policy of calling in on a daily basis to report his ongoing use of FMLA and his ongoing absences from work.

After he was discharged, the claimant went to the employer's place of business and inquired as to why he was terminated when he was on approved FMLA leave but was not given any reason by the employer representatives.

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.

871 IAC 24.32(1)a, (8) provide:

> 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was not given an adequate opportunity to respond to the employer's request for additional medical documentation for his ongoing FMLA leave. The two letters sent to the claimant were sent to incorrect addresses and the claimant did not receive them in sufficient time to be able to respond. While the employer is certainly allowed to request additional documentation for FMLA leave, the claimant must be given an adequate opportunity to respond. The claimant had continued to call in as required by the employer until his termination. The claimant's failure to provide the documentation under these circumstances cannot be found to be misconduct. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work.

Iowa Code Section 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The claimant has received permission from his physician to work albeit with restrictions of no lifting over 30 pounds effective July 22, 2004. Accordingly the claimant is able to and available for work effective July 22, 2004 and benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The July 27, 2004, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. The claimant is able to and available for work effective July 22, 2004. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjf