

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ELBA VAZQUEZ

Claimant

SAC & FOX TRIBE

MESKWAKI BINGO CASINO & HOTEL

Employer

APPEAL NO: 13A-UI-00674-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/09/12

Claimant: Appellant (2)

Section 96.5-2a – Discharge
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department decision dated January 14, 2013, reference 01, that held she voluntarily quit employment without good cause on December 11, 2012, and benefits are denied. A telephone hearing was scheduled and held on March 19, 2013. The claimant, Interpreter, Ike Rocha, and Attorney, Kevin O'Hare, participated. Lucy Roberts, HR Director, and Nicole Kapayou, Food & Beverage Manager, participated for the employer. Claimant Exhibits A & B and Employer Exhibit One was received as evidence.

ISSUE:

The issue is whether claimant was discharged for misconduct in connection with employment.

FINDINGS OF FACT:

The administrative law judge having considered witness testimony and having considered the evidence in the record finds: The claimant worked for the employer beginning January 22, 1997 and last worked as a cook/cashier on August 23, 2012. The employer granted claimant's request for FMLA for up to six weeks due to right foot surgery. No workers' compensation claim was filed. Claimant received an employer-provided short-term disability benefit.

When claimant's FMLA expired on November 15, 2012, the employer granted claimant administrative leave to December 4. Claimant visited employer HR on December 5 after her doctor appointment the day before. She provided a doctor excuse from work. It states she cannot work without restriction and it is not recommended (her ability to stand for an eight-hour work day). She would be re-evaluated in three months.

Since claimant had exhausted all leave and was not released to return to work without restriction, HR requested she resign. Claimant declined. She has a December 13 doctor statement that lists work restrictions that limits her standing to two hours.

The employer terminated claimant effective December 8 because it did not believe she had called in for work December 6, 7 & 8. Claimant had exceeded the absenteeism threshold of

12 points for termination (13 points) with these absences. Claimant responds that the HR representative she talked to on December 5 said there was no need to call in due to the pending employment termination.

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(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 administrative law judge concludes that the employer failed to establish claimant was discharged for excessive unexcused absenteeism on December 8, 2012.

While claimant's leave exhausted on December 4, she was unable to return to work without restrictions due to recovering from foot surgery. She provided a medical excuse to HR on December 5 in person and had an interpreter with her to explain she could not return to work restriction free she could only stand up to two hours). HR wanted claimant to resign because she had exhausted all leave but claimant declined because she wanted to keep her job.

As of December 5 there was no reason for claimant to call in continuing absences from work because she had provided HR with a medical excuse that covered her recovery period for the next three months. The HR request claimant resign is a clear indication the employer wanted to end the employment relationship that day. The continuing period of absences are covered by the medical excuse and the employer's decision to effect an employment termination for absenteeism on December 8 is not based on misconduct (excessive unexcused absenteeism).

In effect once claimant had exhausted all leave, the employer considered her inability to return to work without restriction as a period of excessive absenteeism. While the employer might be justified to terminate relying on its policy, it is not based on job disqualifying misconduct.

DECISION:

The department decision dated January 14, 2013, reference 01, is reversed. The claimant was not discharged for misconduct on December 8, 2012. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs