

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SCOTT A KELLOGG**  
Claimant

**APPEAL NO: 12A-UI-02922-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SAC & FOX TRIBE  
MESKWAKI BINGO CASINO & HOTEL**  
Employer

**OC: 02/15/12  
Claimant: Respondent (2-R)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(7) – Excessive Unexcused Absences  
Section 96.3-7 – Recovery of Overpayment

**STATEMENT OF THE CASE:**

The employer appealed a department decision dated March 15, 2012, reference 01, that held the claimant was not discharged for misconduct on January 16, 2012, and benefits are allowed. A telephone hearing was held on April 9, 2012. The claimant did not participate. Lou Brown, Employee Relations Specialist, participated for the employer. Official Notice was taken of the employer appeal documents.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witness, and having considered the evidence in the record, finds: The claimant began employment on March 22, 2011, and last worked for the employer as a part-time line-service in the food & beverage department on January 16, 2012. He received the employer policies in an employee handbook. The attendance policy provides that an employee who receives 12-points for violations is subject to termination.

The claimant was counseled by the employer at the end of his 90-day probation period that he had an attendance problem due primarily to being late to work. The employer issued claimant a final written warning on October 27, 2011 for having 11.25 attendance point violations. The employer discharged claimant on January 20, 2012 for a no-call, no-show to work on January 16 that put him at 14.75 points.

The claimant failed to respond to the hearing notice. He has received unemployment benefits on his current claim.

## 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 the employer has established claimant was discharged for misconduct in connection with employment due to excessive unexcused absences on January 20, 2012.

The employer established the standard of required behavior for attendance by issuing claimant its policy, counseling him when it became an issue, and issuing a final warning that he was nearing the termination point threshold. His final absence due to a failure to call-in and report to work on January 16 put him well beyond (14.75 points) the termination limit (12 points).

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Since the claimant received benefits prior to being disqualified by this decision, the overpayment issue is remanded to claims for a decision.

**DECISION:**

The department decision dated March 15, 2012, reference 01, is reversed. The claimant was discharged for misconduct on January 20, 2012. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible. The overpayment issue is remanded.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

rls/pjs