

**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**

**DEBORAH A LAWLESS
7434 PASADENA CR
OMAHA NE 68124**

**HARVEY'S BR MANAGEMENT CO INC
HARVEY'S CASINO RESORTS
2701 – 23RD AVE
COUNCIL BLUFFS IA 51501**

**Appeal Number: 05A-UI-05666-JTT
OC: 05/01/05 R: 012
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 for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences
871 IAC 23.43(9)(a) – Combined Wage Claim Transfer of Wages

STATEMENT OF THE CASE:

Harvey's filed a timely appeal from the May 19, 2005, reference 01, decision that the employer could be assessed for benefits paid to the claimant pursuant to a claim established in Nebraska. After due notice was issued, a hearing was held on June 15, 2005. Employee Relations Representative Carrie Buckley represented the employer and presented additional testimony through Mostafa Butajaret. Exhibits One through Ten were received into the record.

FINDINGS OF FACT:

Deborah Lawless was employed by Harvey's Casino Resorts as a full-time slot attendant from July 5, 2004 until April 25, 2005, when Slot Manager Patricia Clark discharged her for excessive absences. Ms. Lawless was not assigned to a particular shift, but worked varied hours.

The employer has an attendance policy that is set forth in an employee handbook. On July 5, 2004, Ms. Lawless executed a written acknowledgement of receipt of the handbook, as well as her obligations to comply with the policies set forth therein. Under the policy, an employee is subject to discharge if the employee accumulates ten attendance points in any twelve-month period. Pursuant to the policy, Ms. Lawless was required to notify her supervisor at least two hours prior the start of her shift if she was going to be late or absent. The employer does not ask an employee the reason for an absence or record the reason for the absence.

The final absence that prompted the discharge occurred on April 24, 2005. On that date Ms. Lawless received a telephone call in the morning whereby she learned her brother had been hurt, was in the emergency room, and that the hospital needed a family representative to come to the emergency room. Ms. Lawless properly notified the employer of the need to be absent. The employer assessed Ms. Lawless one attendance point for the absence, which placed her at 10.5 attendance points and subjected her to discharge.

Ms. Lawless' relevant 2004 absences were as follows: On July 12, Ms. Lawless was absent and was late notifying the employer. On July 29 and August 6, Ms. Lawless was tardy and had not notified the employer she would be late. On August 23, Ms. Lawless was absent and properly notified the employer. On October 15, Ms. Lawless left work early with authorization and the employer did not assess any attendance points. On October 19, Ms. Lawless was absent and properly notified the employer. On November 19, Ms. Lawless was tardy and had not notified the employer she would be late. On December 29, Ms. Lawless was absent and properly notified the employer.

Ms. Lawless' 2005 absences were as follows: On April 3, Ms. Lawless was absent and properly notified the employer. On April 4, Ms. Lawless was absent and was late notifying the employer. Ms. Lawless had gone to New Mexico to get her mother, who is suffering from irreversible breast cancer, and was late getting back.

The employer provided Ms. Lawless with written warnings regarding her accumulation of attendance points on August 6, 2004, August 27, 2004, November 24, 2004, December 10, 2004, February 28, 2005, and April 4, 2005. The April warning indicated Ms. Lawless had accumulated 9.5 attendance points.

REASONING AND CONCLUSIONS OF LAW:

The employer seeks to avoid liability for benefits paid to Ms. Lawless in connection with her claim for benefits in Nebraska.

871 IAC 23.43(9) provides in part:

(9) Combined wage claim transfer of wages.

a. Iowa employers whose wage credits are transferred from Iowa to an out-of-state paying state under the interstate reciprocal benefit plan as provided in Iowa Code

section 96.20, will be liable for charges for benefits paid by the out-of-state paying state, but no reimbursement so payable shall be charged against a contributory employer's account for the purpose of section 96.7, unless wages so transferred are sufficient to establish a valid Iowa claim, and that such charges shall not exceed the amount that would have been charged on the basis of a valid Iowa claim. However, an employer who is required by law or by election to reimburse the trust fund will be liable for charges against the employer's account for benefits paid by another state as required in section 96.8(5), regardless of whether the Iowa wages so transferred are sufficient or insufficient to establish a valid Iowa claim....

Pursuant to the rule cited above, the issue is whether the employer would have been liable for benefits paid to Ms. Lawless had her claim been established in Iowa, rather than Nebraska. The question becomes whether the evidence in the record establishes that Ms. Lawless was discharged for misconduct in connection with her employment.

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 employer bears 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. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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 Ct. App. 1992).

In analyzing discharges based on excessive absences, the administrative law judge applies Iowa law, rather than an employer's attendance policy. However, the employer's policy regarding the time and manner in which the employee must notify the employer of an absence is considered. In order for Ms. Lawless' absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was an unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered

excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence in the record establishes that Ms. Lawless' final absence was an excused absence under Iowa law. Mostafa Butajaret testified at the hearing that he spoke with Ms. Lawless on April 24 *after* the scheduled start of the shift. However, the number of attendance points the employer assessed to Ms. Lawless for the absence, 1.0, comports with Ms. Lawless' testimony that she provided timely notification to the employer. Because the most recent absence was an excused absence under Iowa law, the evidence in the record fails to establish a "current act" of misconduct that might serve as a basis for disqualifying Ms. Lawless for benefits.

Having determined there was no current act of misconduct, the administrative law judge need not address whether the previous absences were excused or unexcused under Iowa law, or whether the unexcused absences were excessive. The administrative law judge will nonetheless address the prior absences. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the following absences were unexcused: July 12 and 29, August 6, November 19, and April 4. Had the final absence been an unexcused absence, the administrative law judge would have concluded, in light of the attendance record between the November 19 and April 4 absences, that Ms. Lawless' unexcused absences were not excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Lawless was discharged for no disqualifying reason. Ms. Lawless would have been eligible for benefits on an Iowa claim, provided she was otherwise eligible, and the employer could be charged for benefits paid to Ms. Lawless on an Iowa claim. Accordingly, the employer's account may be assessed in connection with the claim for benefits Ms. Lawless established in Nebraska.

DECISION:

The representative's decision dated May 19, 2005, reference 01, is affirmed. The claimant was discharged from her employment for no disqualifying reason. The claimant would have been eligible for benefits on an Iowa claim, provided she was otherwise eligible. The employer's account could have been charged for benefits paid to the claimant on an Iowa claim. The employer may be charged for benefits paid to the claimant pursuant to the claim established in Nebraska.

jt/kjw