

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

STEVE M STROHM
Claimant

RIVERSIDE CASINO AND GOLF RESORT
Employer

APPEAL 17A-UI-06834-DB-T
**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 06/11/17
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the June 27, 2017 (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on July 24, 2017. The claimant, Steve M. Strohm, participated personally. The employer, Riverside Casino and Golf Resort, participated through witnesses Anna Cavanaugh, Paul McCune, and Julie Jones.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as slot tech. This employer operates a casino. He was employed from April 18, 2016 until June 5, 2017, when he was discharged. His job duties included customer service and repairs to the slot machines. Claimant's immediate supervisor was Kory Kopf. Claimant typically worked 3:00 p.m. to 11:00 p.m. each day of the week excluding Tuesdays and Wednesdays.

The employer has a written policy in place regarding absenteeism. It is a no-fault policy, meaning that the reason for the absence is not considered, and it provides that an employee can be discharged when they reach ten attendance points. Claimant received a copy of the policy. The employer also has a written reporting policy in which an employee must report his absence at least three hours prior to his scheduled shift start time. The claimant was discharged for absenteeism.

The policy provides that an employee will receive a reprimand when they reach four points, a reprimand when they reach six points, a reprimand when they reach eight points, and then discharge at ten points. Claimant received a final written reprimand at eight points in April of 2017 but did not receive any discipline at four or six points.

Claimant was absent, tardy or left early on several occasions. On June 16, 2016, claimant was absent from work due to an unknown reason but did properly report his absence. On July 12, 2016, claimant was absent for an unknown reason but he did report his absence at least three hours prior to his scheduled shift start time. On July 25, 2016, claimant was tardy to work because he forgot what time he was scheduled to work. He did not properly report this absence. On August 2, 2016, claimant was absent from work due to a knee injury and he did properly report his absence. On September 24, 2016, claimant was absent from work due to illness/knee injury and he did properly report his absence according to the employer's reporting policy. On February 20, 2017, claimant left work early due to illness and did advise his supervisor he was leaving. On February 27, 2017, claimant was tardy to work for an unknown reason but did properly report this absence. On April 27, 2017, claimant was tardy to work due to car troubles. He did not properly report this absence. On May 12, 2017, claimant left work early due to illness. Claimant did properly report this absence.

On June 4, 2017, claimant did not report to work because he was mentally distraught over his minor daughter refusing to return home to his custody. He did properly report this absence to the employer at least three hours prior to his shift beginning.

Claimant's minor child (age 15) was visiting her sister in Walcott, Iowa. The mother of the claimant's minor child came to stay with the minor child at her sister's home during this time. The minor child's mother did not have custody or visitation rights according to an Iowa Court decree. However, the mother's parental rights were never terminated.

On June 4, 2017, the claimant travelled to Walcott, Iowa to retrieve his daughter. He contacted the local police department to assist him. He filed a police report when his daughter would not return with him. He learned that the child's mother had made allegations of abuse against him at that time. The police instructed claimant that he needed to find a lawyer to assist him and the child remained with her mother on June 4, 2017. Claimant was so mentally distraught over the situation that his wife had to drive him to and from Walcott, Iowa. Claimant was too mentally distraught over this situation to work on June 4, 2017. Claimant was discharged from employment due to this final absence.

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. Benefits are allowed.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(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.

Iowa Admin. Code r. 871-24.32(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.

Unemployment statutes should be interpreted liberally to achieve the legislative goal of minimizing the burden of involuntary unemployment." *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 10 (Iowa 1982). The employer has the burden of proof in establishing disqualifying job misconduct. *Id.* at 11. Excessive absences are not considered misconduct unless unexcused. *Id.* at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554 (Iowa Ct. App. 2007).

Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Id.* at 558.

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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law." The requirements for a finding of misconduct based on absences are therefore twofold.

First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192 (Iowa 1984). Second, the absences must be unexcused. *Cosper*, 321 N.W.2d at 10 (Iowa 1982). The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins*, 350 N.W.2d at 191 or because it was not "properly reported." *Higgins*, 350 N.W.2d at 191 (Iowa 1984) and *Cosper*, 321 N.W.2d at 10 (Iowa 1982). Excused absences are those "with appropriate notice." *Cosper*, 321 N.W.2d at 10 (Iowa 1982).

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness and an incident of tardiness is a limited absence. *Higgins*, 350 N.W.2d at 190 (Iowa 1984). Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping is not considered excused. *Id.* at 191. Absences due to illness or injury must be properly reported in order to be excused. *Cosper*, 321 N.W.2d at 10-11 (Iowa 1982). Absences in good faith, for good cause, with appropriate notice, are not misconduct. *Id.* at 10. They may be grounds for discharge but not for disqualification of benefits because substantial disregard for the employer's interest is not shown and this is essential to a finding of misconduct. *Id.*

Excessive absenteeism has been found when there has been seven unexcused absences in five months; five unexcused absences and three instances of tardiness in eight months; three unexcused absences over an eight-month period; three unexcused absences over seven months; and missing three times after being warned. See *Higgins*, 350 N.W.2d at 192 (Iowa 1984); *Infante v. Iowa Dep't of Job Serv.*, 321 N.W.2d 262 (Iowa App. 1984); *Armel v. EAB*, 2007 WL 3376929*3 (Iowa App. Nov. 15, 2007); *Hiland v. EAB*, No. 12-2300 (Iowa App. July 10, 2013); and *Clark v. Iowa Dep't of Job Serv.*, 317 N.W.2d 517 (Iowa App. 1982). Excessiveness by its definition implies an amount or degree too great to be reasonable or acceptable. Two absences would be the minimum amount in order to determine whether these repeated acts were excessive. Further, in the cases of absenteeism it is the law, not the employer's attendance policies, which determines whether absences are excused or unexcused. *Gaborit*, 743 N.W.2d at 557-58 (Iowa Ct. App. 2007).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their

motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds that the claimant's testimony that he was too mentally distraught to work on June 4, 2017 is credible.

The first issue in this case is to determine whether the final incident was excused or unexcused. Claimant clearly reported his absence on June 4, 2017 within the employer's required reporting policy. Claimant truthfully stated the reasons that led to his absence to his employer. Claimant was unable to work due to his mental state regarding these incidents. Absence due to illness or injury is not limited to physical injury or illness. As such, the final absence leading to discharge was excused. Because the final absence was excused, there is no current act of misconduct that the employer based its discharge upon.

As such, the employer has failed to establish that the claimant was discharged for job-related misconduct that would disqualify him from receiving benefits. Benefits are allowed.

DECISION:

The June 27, 2017 (reference 01) unemployment insurance decision denying benefits is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Dawn R. Boucher
Administrative Law Judge

Decision Dated and Mailed

db/rvs