IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARLENA M LOWE
Claimant

CATFISH BEND CASINOS II LLC
Employer

APPEAL NO: 08A-UI-01746-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/20/08 R: 04
Claimant: Appellant (4)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Marlena M. Lowe (claimant) appealed a representative's February 11, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Catfish Bend Casinos II, L.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 6, 2008. The claimant participated in the hearing. Steve Morley appeared on the employer's behalf and presented testimony from one other witness, Toby Cluney. During the hearing, Employer's Exhibits One through Five were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant had two periods of employment with the employer, both of which included quarters that are part of the claimant's base period for her current claim for unemployment insurance benefits established January 20, 2008; the base period is October 1, 2006 through September 30, 2007. The claimant's first period of employment began on October 6, 2005. She worked full time as a cook in one of the employer's food services. Her last day of work in that employment was February 28, 2007. The employer discharged her on March 1, 2007. The reason asserted for the discharge was excessive absenteeism. She had exceeded ten points on the employer's attendance policy, including a number of tardies and absences with late calls, and had received at least two warnings. (Employer's Exhibits Four and Five.) Her last absence was a no-call, no-show on or about March 1, 2007 when she was absent because of getting stuck in the mud in her driveway.

The employer rehired the claimant as of May 3, 2007. She worked full time as a line server in one of the employer's buffets. Her last day of work in this period of employment was January 21, 2008. The employer discharged her on January 23. Again, the stated reason for discharge was excessive absenteeism.

During the claimant's second period of employment, prior to her termination the claimant had only been given one warning, a four-point warning on August 17, 2007. Normally, the employer also gives an employee a warning also at the eight-point level; the employer did not know why no eight-point warning had been given to the claimant. The claimant would have received eight points on or about January 6, 2008. Included in the occurrences that would have brought the claimant to that point were 2.75 points for tardies; the claimant had not been aware until her termination that she had been considered tardy on those occasions and would have disputed at least some of the points; she was not aware until her termination that she was at or above the eight-point level of attendance points.

The claimant was absent for her 7:00 a.m. to 2:00 p.m. shift on January 18, 2008, for which, under the employer's attendance policy, the absence was assessed at two points because of it being a Friday. This brought the claimant's total points to 11.75 and thus to the termination level. The claimant had properly called in her absence. The reason for her absence was that at approximately 10:30 p.m. on January 17 the claimant took her 24-year old son to the hospital due to alcohol poisoning and involuntarily admitted him. She was advised by the medical staff that her son's life was in some jeopardy, and stayed with him at the hospital until about 2:15 a.m. before returning home. After she left the hospital, however, her son slipped out of the hospital and returned to the claimant's home. When he arrived back at her home, the claimant called the hospital and asked for advice; the medical staff advised her that her son's life was still in jeopardy and that she should continue to watch him through the night, which she did. As a result of this experience, the claimant got no sleep that night and was not physically able to work her shift that following morning.

When Mr. Cluney informed the claimant of her discharge on January 23, she attempted to explain the situation to him, and he indicated to her that if she could obtain medical documents to cover the situation to him by January 25, perhaps the absence could be excused. However, since the claimant understood that the employer had already made its decision and she did not believe the hospital would release medical records to her since her son was of legal age, she did not pursue that possibility. Therefore, her discharge remained final.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

871 IAC 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.

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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. Cosper, supra.

There are two terminations between the employer and the claimant which need to be considered, both due to excessive absenteeism. As to the first separation on March 1, 2007, the claimant's final absence was not excused and was not due to illness or other reasonable grounds, nor was it properly reported. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant on March 1, 2007 for reasons amounting to work-connected misconduct. The claimant would be disqualified as of March 1, 2007 until she worked in and been paid wages for insured work equal to ten times her weekly benefit amount, which Agency records indicate she did prior to establishing her current claim for unemployment insurance benefits. Because the March 1, 2007 separation was disqualifying, however, the employer's

account is not subject to charge for benefits paid to the claimant based on any wages credits earned from the employer in that first period of employment. Iowa Code § 96.7-2-a(2).

In the second period of employment, however, the claimant had not been properly or effectively warned that she was approaching the point at which a future absence could result in termination. Higgins, supra. Further, even though the employer chose not to excuse the claimant's final absence without medical documentation, for purposes of unemployment insurance eligibility the claimant has established that the final absence was related to a properly reasonable grounds, so no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct for the second period of employment. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's February 11, 2008 decision (reference 01) is modified in favor of the claimant. For the first period of employment ending March 1, 2007, the employer discharged the claimant for disqualifying reasons. The claimant has requalified after the March 1, 2007 separation. For the second period of employment ending January 23, 2008, the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The employer's account will not be charged for any benefits paid to the claimant based on wage credits earned on or before March 1, 2007.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs