

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

CRAIG D O'HARA
220 MIDLAND DR
COUNCIL BLUFFS IA 51503-0400

HARVEYS IOWA MANAGEMENT CO INC
HARRAHS COUNCIL BLUFFS CASINO
1 HARVEYS BLVD
COUNCIL BLUFFS IA 51501

Appeal Number: 06A-UI-02220-HT
OC: 01/29/06 R: 01
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

STATEMENT OF THE CASE:

The employer, Harrah's Casino, filed an appeal from a decision dated February 16, 2006, reference 01. The decision allowed benefits to the claimant, Craig O'Hara. After due notice was issued, a hearing was held by telephone conference call on March 14, 2006. The claimant participated on his own behalf. The employer participated by Employee Relations Representative Carrie Buckley. Exhibit One was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Craig O'Hara was employed by Harrah's Casino from June 7, 1996 until January 30, 2006. He was a full-time dealer.

The employer's attendance policy is based on a point system with different point totals being assessed for various types of absences. Warnings are given when a certain number of points are accumulated and points drop off after one year. Points may be earned if an employee has perfect attendance for 90 days. Discharge occurs when ten points are accumulated. The entire policy is set out in the employee handbook which the claimant received on August 14, 2003, and the claimant was aware of it.

Mr. O'Hara received his final written warning on August 29, 2005, when he had accumulated eight points. After that one point dropped off and he gained two more points. On January 29, 2006, he called in sick due to a headache. This was not a migraine but a regular headache and he acknowledged he would have come to work if he had known he did not have any more points to use. He was discharged by Assistant Casino Shift Manager, John Berger, when he returned to work on January 30, 2006, because he had reached ten points.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is not.

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(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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 claimant was discharged for exceeding the number of attendance points allowed. The final incident of absenteeism was when he missed work due to a headache. The administrative law judge does not know whether a non-migraine headache may be considered an illness, especially as the claimant acknowledged he would have come to work if he had known he did not have any points to spare. However, the employer considered it an absence due to illness and a properly reported illness cannot be considered misconduct as it is not volitional. Cosper v. IDJS, 321 N.W.2d 6, 11 (Iowa 1982). There was no final incident of misconduct as required by 871 IAC 24.32(8) and disqualification may not be imposed.

DECISION:

The representative's decision of February 16, 2006, reference 01, is affirmed. Craig O'Hara is qualified for benefits, provided he is otherwise eligible.

bgh/kkf