

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DELORES E MOORE
Claimant

APPEAL NO. 14A-UI-02157-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**PRAIRIE MEADOWS RACETRACK &
CASINO**
Employer

OC: 02/24/13
Claimant: Appellant (1)

Section 96.5-2-a- - Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated February 24, 2014, reference 05, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on March 18, 2014. Claimant did not participate in hearing. The employer participated by Ms. Pam Anderson, Human Resource Generalist.

ISSUE:

The issue is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Delores Moore was employed by Prairie Meadows Racetrack & Casino from March 26, 2013 until January 16, 2014 when she was discharged for violating the company's attendance policy. Ms. Moore was employed as a full-time hotel bartender and was paid by the hour. Ms. Moore was discharged on January 16, 2014 after she had reported to work on Friday, January 10, 2014 late. The claimant had been warned prior to her discharge that her attendance and punctuality were unsatisfactory and that further attendance violations could result in her termination from employment. During the time that Ms. Moore was employed by Prairie Meadows Racetrack & Casino, she had been tardy on May 19, June 8, and July 9. The claimant had been absent November 9, 2013 and on February 20, 2013. The claimant had called in late for an absence on December 22, 2013 and most recently had reported to work tardy on January 10, 2014.

In addition to the claimant's issues with attendance and punctuality, the claimant also continued to have training issues.

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(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.

The employer has 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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

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 Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused and

that the concept includes tardiness, leaving early, etc. The Court in Harlan v. Iowa Department of Job Service, 350 N.W.2d 192 (Iowa 1984) held that absence due to matters of personal responsibility such as transportation problems and oversleeping are considered unexcused.

Based upon the evidence in the record, the administrative law judge concludes that the employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment.

The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$4,895.00 since filing a claim with an effective date of February 24, 2013 for the weeks ending March 2, 2013 through February 22, 2014. The administrative record also establishes the employer did participate in the fact-finding interview or made a firsthand witness available for rebuttal.

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.

Because the claimant's separation was disqualifying, benefits are paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who received benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based upon a reversal on appeal of initial determination to award benefits on an issue regarding the claimant's employment separation if; (1) the benefits are not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceedings to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code section 96.3-7. In this case the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay to the agency the benefits she received and the employer's account shall not be charged.

DECISION:

The representative's decision dated February 24, 2014, reference 05, is affirmed. Claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$4,895.00 and is liable to repay that amount as the employer did participate in the fact finding.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs