

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

ELIZABETH S. SIZEMORE,
Claimant

DIA APPEAL NO. 23IWDUI0010

IWD APPEAL NO. 22A-UI-14242

RIVERSIDE CASINO AND GOLF RESORT
Employer

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/22/22

Claimant: Appellant (2)

Iowa Code § 96.4(3) – Able and Available for Work

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

STATEMENT OF THE CASE:

The claimant/appellant, Elizabeth Sizemore, filed an appeal from the June 17, 2022, (reference 01) unemployment insurance decision that concluded Sizemore was not eligible for unemployment insurance benefits because she was discharged for excessive, unexcused absenteeism after being warned.

A telephone hearing was held on August 29, 2022. The parties were properly notified of the hearing via a Notice of Telephone Hearing sent to both parties at the above-listed addresses on or about July 19, 2022. Sizemore participated and was self-represented. Riverside Casino and Golf Resort (Riverside) was represented by Mackenzie Sperflage, human resources business partner. Riverside submitted the following documents: a written statement from Sperflage, an attendance policy, a complete list of absences within the past year, warnings, and an acknowledgment signed by Sizemore. These documents were admitted into the record without objection.

ISSUES:

Was claimant able and available for work?

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Elizabeth Sizemore began working as a full-time dealer at Riverside in December 2017. Her last shift worked was Wednesday, May 25, 2022. She had a set schedule and worked four 10-hour

days each week (Wednesday – Saturday). Her direct supervisor was Carol Parker, casino shift manager. (Sizemore testimony.)

On Saturday, May 21, 2022, Sizemore had car trouble on the drive to work. She has an hour drive to and from work, and she called in when her car broke down. Sizemore was not able to work her shift on May 21. Sizemore was not scheduled to work on Sunday, May 22. She worked 8.5 hours of her 10-hour shift on Wednesday, May 25, and was sent home early because the casino was not busy. (Sizemore testimony.)

On Thursday, May 26, Sizemore was ill and unable to work. She initially called Diana, a supervisor at Riverside and reported her illness. A few minutes later, the casino shift manager and the shift manager's boss called Sizemore and terminated her employment at Riverside. These individuals told Sizemore her employment was terminated because she missed her May 21 shift due to car problems. When she missed the May 21 shift, her total points met or exceeded the 10-point termination limit. (Sizemore testimony.)

Sizemore's May 26 illness was temporary, and she was able to return to work after May 26. Sizemore recalled signing all of the written warnings and final warnings given to her by Riverside managers, but she did not believe her job was in jeopardy on May 26. (Sizemore testimony.)

Mackenzie Sperflage has worked in human resources at Riverside for approximately 13 months. She facilitated Sizemore's FMLA paperwork and specified her termination was not based on absences covered by FMLA. Sperflage received an email from Carol Parker on May 25 regarding Sizemore's termination. Her employment was terminated when she missed her May 21 shift because of car problems. Sizemore exceeded her 10-point maximum on May 21. (Sperflage testimony.)

Sperflage's records show Sizemore worked 8.15 hours of her May 25 shift. Sizemore was not informed of her May 21 termination until May 26 because Riverside was reviewing paperwork to make sure the absences used to calculate her 10 points were not covered by FMLA. (Sperflage testimony.)

Sperflage's written statement admitted to the administrative record notes Riverside has an attendance policy where employees accrue points for all absences not legally protected. Sizemore was aware of this policy when she began working at Riverside.

Riverside records show Sizemore signed a Final Warning on May 12, 2022, and received notification she had 8.5 points. Sizemore called to report her absence on May 21 when she had car trouble, but she received an additional 3 points for this absence because it was a weekend shift and the absence was reported less than an hour before the shift started. Riverside records show Sizemore was absent on May 22, but Sizemore did not accumulate any points for this alleged no call/no show. Sizemore testified May 22 was a Sunday, and she was not scheduled to work on Sundays.

The Employee Acknowledgement submitted by Riverside and signed by Sizemore specifies employees must call in three hours before their scheduled shift. Points accumulate over one year, and employees are terminated if they receive 10 points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the June 17, 2022, unemployment insurance decision that found Sizemore ineligible for benefits due to excessive, unexcused absenteeism is reversed.

Sizemore provided credible testimony she was able to work following her termination from Riverside, and I find she was able and available for work. Iowa Code § 96.4(3).

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:

Iowa Administrative Code rule 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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy. However, if the employer fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

It is uncontested Sizemore was terminated from her dealer position at Riverside because she had car trouble on May 21, 2022, and reported her absence less than three hours before her shift. However, Sizemore worked over eight hours on May 25 and was not notified of her termination until she called in sick on May 26. It is uncontested Sizemore called her employer as soon as she became aware of car problems on May 21. Sperfslage acknowledged Sizemore's termination was not based on misconduct and was based only on an accumulation of more than 10 points.

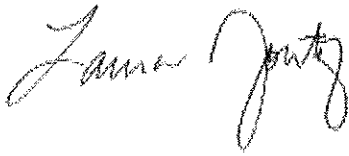
Absences can rise to the level of misconduct if the absences are both excessive and unexcused. See *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187 (Iowa 1984). "Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct 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). Sizemore provided credible testimony she contacted her employer as soon as possible when she had car trouble, and Riverside did not provide any evidence of Sizemore failing to properly report an absence. Therefore, I find Sizemore's May 21 absence falls under "other reasonable grounds . . . properly reported to the employer." 871-24.32(7).

A discharge for misconduct cannot be based on a past act, and termination of employment must be based on a current act. 871-24.32(8). Riverside was aware of Sizemore's point total on May 21 and could have terminated her employment at that time or informed Sizemore of a pending termination regarding her point total. Instead, Sizemore was not informed of her pending termination until after she worked over eight hours on May 25.

I find Sizemore's conduct did not rise to the level of misconduct. Her absences were properly reported to her supervisor, and Riverside allowed Sizemore to work over eight hours on May 25 before terminating her on May 26. Although Riverside considered Sizemore's absences excessive, I do not find the absences were unexcused. Riverside can terminate Sizemore's employment for accumulating more than 10 points, but Riverside does not have grounds to deny Sizemore's unemployment insurance benefits. Sizemore did not commit misconduct and benefits shall be allowed, provided she is otherwise eligible.

DECISION:

The June 17, 2022, unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.



Laura Jontz
Administrative Law Judge

Administrative Law Judge
Department of Inspections and Appeals
Administrative Hearings Division

September 8, 2022

Decision Dated and Mailed

cc: Elizabeth S Sizemore, Claimant (by first class mail)
Riverside Casino and Golf Resort, Employer (by first class mail)
Joni Benson (by email)

APPEAL RIGHTS. If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: eab.iowa.gov**

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.

AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Note to Parties: YOU MAY REPRESENT yourself in the appeal or 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.

Note to Claimant: It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

SERVICE INFORMATION:

A true and correct copy of this decision was mailed to each of the parties listed.

DERECHOS DE APELACIÓN. Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

Nota para las partes: USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

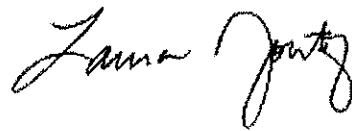
Nota para el reclamante: es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

SERVICIO DE INFORMACIÓN:

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.

Case Title: ELIZABETH S. SIZEMORE V. RIVERSIDE CASINO AND GOLF
RESORT
Case Number: 23IWDUI0010
Type: Final Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Laura Jontz". The signature is written in a cursive, flowing style.

Laura Jontz, Administrative Law Judge