

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**GARY L DEJONG**  
Claimant

**SCE PARTNERS LLC**  
Employer

**APPEAL 17A-UI-11683-NM-T**  
**ADMINISTRATIVE LAW JUDGE**  
**DECISION**

**OC: 09/03/17**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the November 9, 2017, (reference 03) unemployment insurance decision that denied benefits based on his discharge for excessive unexcused absenteeism. The parties were properly notified of the hearing. A telephone hearing was held on December 5, 2017. The claimant participated and was represented by attorney Carmalita Hawkins. The employer did not participate.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as an executive casino host from August 24, 2014, until this employment ended on September 7, 2017, when he was discharged.

The employer has an attendance policy in place which allows employees to accumulate up to 12 attendance points prior to being discharged from employment. If employees were less than 30 minutes late or gone for two consecutive days a half point was issued, if you were more than 30 minutes late or absent with a call two hours prior to shift a full point was issued, a call during a shift was four points, a no-call/no-show was six points. After 180 days of perfect attendance, any accumulated points or disciplinary actions were cleared. Claimant testified the policy was somewhat confusing, as it was not uniformly enforced and unclear how it applied to salaried employees, like himself, who were on call at all times and often worked off-site, dealing with issues via telephone, or before and after regular work hours.

Claimant was absent from work on April 5 and late on April 6 because he was with his girlfriend while she was addressed a health need involving her mother. Claimant was absent from work due to illness on April 18. Claimant was late to work on April 19 and June 15 and was also late to a volunteer work event on June 30, 2017. All of claimant's tardies were less than 30 minutes and each absence was reported more than two hours prior to the start of his shift. Claimant

also testified he was issued points for a no-call/no-show on September 15, 2016, even though he was only late to work that day and did call in to report he was running late. Claimant noted those points should have fallen off prior to his next attendance occurrence on April 5, 2017.

On July 12, 2017, claimant was issued a final warning for his attendance. Claimant testified he had received no warnings prior to July 12, even though the employer's progressive disciplinary policy calls for written and verbal warnings prior to a final warning being issued. Claimant was told by his immediate supervisor, Mike McGowen, that he was at 14.5 points as of July 12. Claimant questioned how these points were being allocated and was told by McGowen that was just what human resources said. Claimant noted the September 2016 points should not be included, but got no response from McGowen on that point.

On September 6, 2017, claimant was running late to the office because he had dropped his step-daughter off at the airport. Claimant testified he had already been working off-site on his telephone for several hours that day, trying to deal with an issue that had come up with the employer's hotel. Claimant phoned McGowen to inform him he was running late, but was told not to come in. The following day, claimant was discharged for his attendance.

#### **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.

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(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 employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 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. *Gaborit*, supra.

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* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins*, supra.

Claimant was discharged for his attendance. Claimant was absent from or tardy to work for reasons that would generally be considered unexcused on five occasions between April 1 and June 30, 2017. Claimant's final attendance occurrence was on September 6, 2017, when he called to report he would be in to the office late, though he testified he had already been working remotely for several hours prior. Claimant was issued a final warning about his attendance on July 12, 2017. However, claimant provided credibly testimony that he was confused on the attendance policy and how it was being applied. Based on the unrefuted testimony of the claimant it does not appear the employer was following its own policy when assessing points to the claimant or making the decision to terminate him from employment. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Inasmuch as the employer's attendance policy and its

application was not made clear to the claimant or applied in a manner consistent with the written policy, the employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Benefits are allowed.

**DECISION:**

The November 9, 2017, (reference 03) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs