IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MONIQUE L THOMAS
Claimant

AMERISTAR CASINO COUNCIL BLUFFS
Employer

APPEAL NO: 09A-UI-09475-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/25/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ameristar Casino Council Bluffs, Inc. (employer)) appealed a representative's June 23, 2009 decision (reference 01) that concluded Monique L. Thomas (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 20, 2009. The claimant participated in the hearing. Malia Maples of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Emily Jones. During the hearing, Employer's Exhibit One was 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 started working for the employer on October 9, 2007. She worked part time (approximately 25 hours per week) as a swing shift dealer at the employer's Council Bluffs, Iowa casino. Her last day of work was May 23, 2009. The employer suspended her on that date and discharged her on May 25, 2009. The reason asserted for the discharge was excessive absenteeism.

At the time of the discharge the employer's attendance policy provided for discharge at nine occurrences. Prior to May 20, 2009, the claimant had eight occurrences. Seven of the occurrences were absences called in for illness. A half-point was due to being 15 minutes tardy on January 10, 2009, and the remaining half-point was due to leaving early due to illness on April 11, 2009. She had been given a final warning on December 2, 2008. While she had several absences after the final warning, points had "rolled off" prior to the additional absences so she still had not hit nine occurrences.

The most recent absence prior to May 20 was on May 19, when the claimant called in an absence due to illness, bringing her back to the eight point level. The claimant had been

scheduled to attend a mandatory staff meeting on May 20. This had only been scheduled a few days in advance of May 20. The claimant had another job that she scheduled around her job at the casino, but since the mandatory meeting was scheduled with short notice, she had already been scheduled to work her other job on May 20. She informed a supervisor about the conflict a few days before May 20 and indicated she might not be able to be at the meeting. She was advised to do what she could to be at the meeting.

The claimant went to her other job on May 20 to see if she could reschedule any of that work that day, but was unable to do so. She did call and speak to a floor supervisor at approximately 10:00 a.m. to report she could not get out of her other job and would not be able to make the meeting. The supervisor did not report the call to human resources, so it was treated as a no-call/no-show. Regardless of whether the absence was treated as no-call/no-show, the occurrence resulted in the claimant exceeding the attendance points and she was discharged.

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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). 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. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). The vast majority of the claimant's occurrences were due to illness.

Even the final absence was reasonably outside the claimant's control. Because the final absence was related to a reasonable grounds, 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. 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 June 23, 2009 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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