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

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AMERISTAR CASINO COUNCIL BLUFFS
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Appeal Number: 06A-UI-05007-DT
OC: 04/16/06 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:

Ameristar Casino Council Bluffs, Inc. (employer) appealed a representative's May 8, 2006 decision (reference 01) that concluded Willie E. Hill (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 May 24, 2006. The claimant participated in the hearing. Lucie Reed of TALX Employer Services appeared on the employer's behalf and presented testimony from one witness, Shila Kinsley. 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 December 18, 2000. He worked full time as a cook on a Friday through Tuesday, 6:00 a.m. to 2:00 p.m. schedule. His last day of work was April 14, 2006. The employer suspended him on April 15 and discharged him on April 18, 2006. The reason asserted for the discharge was excessive absenteeism.

The employer has an eight-point attendance policy – if an employee loses more than eight points in a 12-month rolling period, they are subject to discharge. In the 12 months prior to April 15, 2006, until April 6, 2006, the claimant had incurred the following attendance incidents:

Date	Occurrence/reason if any	Points Assessed
04/26/05	Late, overslept.	.5 point
05/29/05	Late on holiday.	1.0 point
06/24/05	Absent, late call.	1.5 points.
08/23/05	Late, overslept.	.5 point.
10/16/05	Late.	.5 point.
12/02/05	Absent, properly reported.	1.0 point.
01/08/06	Absent, properly reported.	1.0 point.
02/07/06	Late.	.5 point.
03/12/06	Absent, late call.	1.5 points.

The employer's attendance policy runs on a deduction basis with some points being added for good attendance or for old absences falling off the attendance record, so that discharge actually occurs when the employee runs out of points and reaches zero points. According to the employer's attendance calculations, as of the March 12, 2006 absence, the claimant actually had a half-point remaining; on March 14 he was advised that he only had the half-point left. He regained another point on March 25, bringing him back to 1.5 points, and regained another half-point on April 6, bringing him back to 2.0 points.

On April 7, 2006, the claimant called in to report an absence for illness for which he had a doctor's excuse covering him for that day through April 11, 2006; however, he called in 15 minutes less than the required two-hour notice, so he was assessed 1.5 points for the multi-day absence, reducing him to a half point. He believed he actually had a full point left as of that absence. Another half-point went back onto his points as of April 8, 2006, so he believed he had at least 1.5 points, when actually he had only one point left. The claimant returned to work on April 14, 2006; however, he was still feeling ill, which was apparent also to his supervisor, and the claimant left after only about 2.5 hours. He returned to his doctor, who provided a doctor's excuse covering him through April 17, 2006; he reported the fact of this doctor's excuse to the employer. On April 15 the employer contacted the claimant and informed him he was out of points and was suspended pending further review; on April 18 the employer informed the claimant he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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 for the absence under its attendance policy. Cosper, supra. Because the final absence was related to properly reported illness or other 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 May 8, 2006 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 he is otherwise eligible.

ld/kkf