

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TODD J KENYON
Claimant

GRAND FALLS CASINO RESORT LLC
Employer

APPEAL 17A-UI-13246-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 11/12/17
Claimant: RESPONDENT (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed an appeal from the December 14, 2017, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on January 18, 2018. Claimant participated. Employer participated through Keri Huebers, Director of Human Resources and Sharon Haselhof, General Manager. Employer's Exhibit 1 was entered into the record.

ISSUE:

Was the claimant discharged for job connected misconduct sufficient to disqualify him from receipt of unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as director of table games beginning on May 9, 2011 through October 2, 2017, when he was discharged. The claimant was discharged for poor attendance, missing mandatory meetings and failure to perform his job duties.

As a director level employee the claimant had no set amount of paid time off (PTO) he could use. Nor was he held to a set time he was to be to work every morning or to a set time when he could leave each day. He was generally required to work forty hours or more per week.

Ms. Haselhof was the claimant's direct supervisor and spoke to him about his attendance. She emphasized with him that he had to set an example for all of the employees he supervised by being at work and visible to his employees. None of the repeated conversations were presented to the claimant as warnings and none were documented as disciplinary. The claimant was not given any performance evaluations.

All employees were required to attend a mandatory meeting on either September 25 or 26. Each employee, including the claimant was allowed to pick the time they would attend the meeting. The claimant picked the last available meeting time on September 26. He was ill and reported to the person conducting the meeting via e-mail about forty five minutes before the meeting was to start that he would not be at the meeting. The employer later learned that the claimant was not sick, but they only learned of that after he had already been discharged.

The claimant was never given any warnings that his failure to improve his attendance or his job performance was placing his job in jeopardy. The pattern developed where Ms. Haselhof would talk to the claimant about his attendance, he would improve for a short period of time, then fall right back into the same habit of failing to show up for work. Ms. Haselhof allowed the pattern to repeat from at least July onward. There was no reason for the claimant to believe that he needed to change his behavior when he had been allowed to repeatedly miss work, meetings and fail to accomplish projects.

The claimant was not required to document his time at work on his outlook calendar. He volunteered to do so, and as was his pattern would only follow through on a haphazard manner. The claimant was never specifically told that his outlook calendar had to be an accurate reflection of his time at work.

The claimant went on visits to other casinos but failed to take the marketing director with him as he was told to do so. The marketing director reported to Ms. Haselhof that the claimant had not asked her to attend. She did not testify at the hearing.

For the period from September 6 through October 1, the claimant was only at the business for a total of 54 hours and 18 minutes. During some of that time, he was using part of his unlimited allowance of PTO. Also during that period, he was visiting other casinos in the area.

At no time did the claimant ever ask the employer for any accommodation due to stress or anxiety.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

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, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. The claimant's attendance at work was abysmal. The employer knew he was missing work for months prior to discharge, but did not warn the claimant or put him on notice that he had to change his behavior in order to preserve his employment. While the employer had high expectations of the claimant as he was a director level manager, he was still entitled to notice that his behavior had to change in order to preserve his 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. Under these circumstances, the employer simply has not met their 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 December 14, 2017, (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs