IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

FALLON M LORENZEN Claimant **DIAMOND JO WORTH LLC** Employer	**APPEAL 15A-UI-01453-H2T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/11/15** **Claimant: Appellant (2)**

Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 27, 2015, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. A telephone hearing was held on April 23, 2015. Claimant participated. Employer participated through Alyssa Slattum, Human Resources Specialist and was represented by Tom Kuiper of TALX UC eXpress. Employer's Exhibit One was entered and received into the record.

ISSUE:

Did the claimant voluntarily quit her employment without good cause attributable to the employer or was she discharged due to job-connected misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed part-time as a bartender beginning on June 10, 2013 through June 17, 2014 when she voluntarily quit rather than be fired.

The claimant injured her knee in a non-work-related incident on June 6, 2014. She was eventually released to return to work by her treating physician so long as she wore a knee brace. Her physician told her she would need surgery that would require a recovery period of at least six weeks. When the claimant told Nancy Vine that she would need to be off work for six weeks, she was told that under the employer's attendance policy she would point out and be discharged for missing too much work before she completely recovered. The claimant had not worked the required 412 hours to make her an employee eligible for leave under the Family Medical leave act (FMLA). Ms. Vine also told the claimant she would not be allowed to work as a bartender so long as she had to wear the brace. Ms. Vine told the claimant that she should quit and reapply when she was fully recovered as she would not remain an employee if she did not. Under those circumstances, that knowing she could not protect her job with FMLA; that the employer would not let her continue working so long as she had to wear the knee brace and that she would need longer than 30 days to recover from the surgery, the claimant chose to quit

rather than be discharged. If the claimant had been discharged she would not have been eligible for rehire in the future.

When the claimant fully recovered in November 2014 she reapplied for a different job. She was not hired back because intervening criminal charges made it impossible for her pass the employer's background check despite the fact that she still possessed a valid gaming license.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5(1) provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Iowa Admin. Code r. 871-24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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).

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Here the claimant only voluntarily resigned because she was told she would be discharged otherwise. Under these circumstances the claimant's leaving is more properly characterized as a discharge, not a voluntary quit.

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).

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. Here, the claimant was going to be discharged due to attendance issues as she was not able to work without restrictions due to an injury.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). An employer's point system, no-fault absenteeism policy or leave policy is not dispositive of the issue of qualification for benefits. Thus, any discharge for absences due to the injury would not be considered as unexcused for the purposes of the unemployment law and would not be job connected misconduct. Thus, employer has not met the burden of proof to establish that claimant engaged in job connected misconduct sufficient to disqualify her from unemployment insurance benefits. Benefits are allowed.

DECISION:

The January 27, 2015 (reference 01) decision is reversed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

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