IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANGELICA GOMEZ
Claimant

SAC & FOX TRIBE
MESKWAKI BINGO CASINO & HOTEL
Employer

APPEAL NO: 12A-UI-04535-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 03/11/12
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Angelica Gomez (claimant) appealed a representative's April 10, 2012 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Sac & Fox Tribe / Meskwaki Bingo Casino & Hotel (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 11, 2012. The claimant participated in the hearing. Lou Brown appeared on the employer's behalf. During the hearing, Employer's Exhibits Four and Seven were 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 there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on June 22, 2004. She originally worked full time, but as of about December 15, 2011 she worked part time as a poker supervisor. Her last day of work was February 19, 2012. The employer asserted that she voluntarily quit by job abandonment as of March 10, or alternatively that she was discharged for excessive absenteeism under the employer's 12-point attendance policy.

The claimant went to part-time status because she had enrolled in school; her part-time schedule was typically to work some combination of Fridays from 6:00 p.m. to 2:00 a.m., and Saturdays and Sundays from 12:00 p.m. to 8:00 p.m. The claimant had been scheduled to work

on Sunday, February 26, but was absent for personal reasons, for which the employer assessed her two points.

The claimant had requested more than a month in advance to be off the weekend of March 3 and she was told it had been approved. However when that weekend arrived the employer had the claimant scheduled for work, and when she was absent, she was considered a no-call, no-show for March 3. The employer assessed her four points for this occurrence. Additionally, the claimant was required to take a mandatory training class during the month of February. She had previously discussed with her supervisor that the times the classes were being offered conflicted with her school schedule. He indicated that they would work something out. However, when the claimant had not taken the class by the end of the month on February 29, the employer assessed the claimant four points for missing the mandatory training class.

The employer asserted that the claimant voluntarily quit by job abandonment because she did not return to work and was a no-call, no-show after February 26. However, the claimant did not return because she had spoken with her immediate supervisor on March 3 and March 7 and had been told she was discharged. Alternatively, the employer asserts that the claimant was discharged because after the four points for March 3 and the four points for missing the training class, with the additional 6.5 points she had for absences prior to February 29, she was at 14.5 points under the 12-point attendance policy.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she quit by job abandonment. The claimant reasonably understood that she had been discharged by the employer, so there was no job to return to after March 3. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then 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 or even had any other choice but 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).

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).

The reason the employer effectively discharged the claimant was her attendance. Excessive and unexcused absenteeism can constitute misconduct. 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. The claimant reasonably believed that her request for vacation the weekend of March 3 had been approved; her absence on that date is considered excused. Further, the claimant reasonably believed that her supervisor was taking care of arranging for her to take the mandatory training at some alternative time; her failure to take the class by the end of February is not an "unexcused absence." The administrative law judge notes that without these eight points the claimant would have only been at 6.5 points under the employer's policy. In order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The claimant was not aware that she would be assessed four points for either her March 3 absence or for not having taken the class in February. The employer has not established there was excessive unexcused absenteeism and has not shown there was a final and current incident of unexcused absenteeism to establish work-connected misconduct. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant is able and available for work on the same basis as when her base period wages were earned arose as a result of the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's April 10, 2012 decision (reference 01) is reversed. The claimant did not voluntarily quit and 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. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs