

**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**

**DALE A RICKE
2563 WASHINGTON ST
DUBUQUE IA 52001-3347**

**DUBUQUE RACING ASSOCIATION LTD
PO BOX 3190
DUBUQUE IA 52001-3190**

**Appeal Number: 06A-UI-05001-RT
OC: 04/09/06 R: 04
Claimant: Appellant (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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Dale A. Ricke, filed a timely appeal from an unemployment insurance decision dated May 4, 2006, reference 02, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 24, 2006, with the claimant participating. Tami Schnee, Human Resources Generalist, participated in the hearing for the employer, Dubuque Racing Association Limited. Employer's Exhibits One through Three were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One through Three, the administrative law judge finds: The claimant was employed by the employer as a part-time busser from October 14 or 15, 2005, until he was separated from his employment on April 2, 2006. On that day the claimant called the employer and left a message on the answering machine for his supervisors that he was quitting. The claimant did not say why. This is confirmed by a note from one of his supervisors as shown at Employer's Exhibit One. The claimant left work early on March 30, 2006 and then was absent on March 31, 2006, for personal illness and these were properly reported to the employer. The employer has a policy as shown at Employer's Exhibit Two requiring that an employee notify the employer before the employee's shift starts if that employee is going to absent or tardy. The policy also provides that an employee who is absent for two consecutive work days without notifying the employer is considered a voluntary quit. The claimant received a copy of this policy and signed an acknowledgement as shown at Employer's Exhibit Two. On April 1 and 2, 2006, the claimant was absent for personal illness but did not notify the employer. The claimant then left the telephone message noted above. On April 3, 2006, the claimant called and spoke to a supervisor, Lisa Dalsing, and asked for his job back. Ms. Dalsing said she would look into it and get back to the claimant. She called the claimant back and said no he could not have his job back. No one ever told the claimant that he was fired or discharged. The claimant testified that he was harassed by another supervisor who followed him around and made him do "stuff" that he was not required to do. The claimant gave no other examples of his harassment and never reported such harassment to human resources. Occasionally the employer was short staffed but always immediately posted the vacancies for a few days for internal purposes and then advertised the vacancies in various places. From January of 2006 to March of 2006, the employer had six vacant positions but all were appropriately posted and notified and filled.

In addition to the absences as noted above, the claimant was tardy on three occasions as follows: March 26, 2006, four minutes because he overslept; January 28, 2006, six minutes but the claimant could not recall why; and January 11, 2006, four minutes and again the claimant could not recall why. The claimant also had other absences but these were for personal illness and properly reported. The claimant received a verbal warning for his attendance on February 4, 2006. However, before the employer could provide the claimant any other warnings he was absent on numerous occasions immediately before his separation as noted above. The claimant's attendance is shown at Employer's Exhibit Three.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

Iowa Code section 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.

871 IAC 24.25(21) provides:

Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(21) The claimant left because of dissatisfaction with the work environment.

871 IAC 24.26(2)(3)(4) 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:

(2) The claimant left due to unsafe working conditions.

(3) The claimant left due to unlawful working conditions.

(4) The claimant left due to intolerable or detrimental working conditions.

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.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily left his employment effective April 2, 2006. The claimant maintains that he was discharged on April 2, 2006 but later indicated that it was on April 3, 2006. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left his employment voluntarily on April 2, 2006. The employer's witness, Tami Schnee, Human Resources Generalist, credibly testified that the claimant called and left a message for his supervisor on April 2, 2006 informing him that he quit. The claimant does not contest this but merely testified that he did not recall. The administrative law judge concludes that the claimant did leave such a message. This is confirmed by a statement of one of the supervisors who heard the message as shown at Employer's Exhibit One. The claimant did call the employer on April 3, 2006 and ask for his job back. Had the claimant been discharged previously he would not have made the call. This phone call occurred after he had left the message indicating that he was quitting. The claimant's phone call, at most, was merely a request for withdrawal of his resignation made the day before. In Langley v. Employment Appeal Board, 490 N.W.2d 300 (Iowa App. 1992), the Iowa Court of Appeals held that when an employee voluntarily resigns and the employer refuses to accept a subsequent withdrawal of resignation prior to its effective date, the employee is considered to have voluntarily quit for purposes of eligibility for unemployment insurance benefits. The administrative law judge notes that here the claimant's withdrawal comes after the effective date of his resignation which appears to be immediate. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily effectively April 2, 2006. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6(2). The administrative law judge concludes that the claimant has failed to meet his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The claimant testified that he was harassed by a supervisor but merely gave as examples that the supervisor would follow him and require him to perform tasks that were not required for the job. The administrative law judge concludes that the claimant has not demonstrated by a preponderance of the evidence that his working conditions were unsafe, unlawful, intolerable or detrimental or that he was subjected to a substantial change in his contract of hire. It does

appear that the claimant was dissatisfied with his work environment, but this is not good cause attributable to the employer for a quit. The claimant was absent for several days prior to his quit but leaving work voluntarily because he thinks he is going to be discharged or because he is reprimanded or thinks he is going to be reprimanded is not good cause attributable to the employer. The administrative law judge notes that there is no evidence that the claimant ever expressed any concerns to the employer about his harassment allegations as noted above. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct. The evidence establishes that the claimant had two absences on April 1 and 2, 2006 that were not properly reported to the employer even though they were for personal illness. The evidence also establishes that the claimant had three tardies and at least one was because he overslept. The claimant did not provide reasons for the other tardies. The administrative law judge concludes that these three tardies were not for reasonable cause or personal illness and not properly reported. The administrative law would finally conclude that the two unreported absences and the three tardies establish excessive unexcused absenteeism. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and the claimant would still be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision of May 4, 2006, reference 02, is affirmed. The claimant, Dale A. Ricke, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer.

cs/pjs