IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

DEREK J CHANDLER Claimant **DIAMOND JO LLC** Employer	**APPEAL 16A-UI-11482-SC-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 09/18/16** **Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

Derek J. Chandler filed an appeal from the October 13, 2016, (reference 01) unemployment insurance decision that denied benefits based upon the determination Diamond Jo, LLC (employer) discharged him for excessive unexcused absenteeism and tardiness after being warned. The parties were properly notified about the hearing. A telephone hearing was held on November 7, 2016. The claimant participated personally. The employer participated through Team Member Services Manager Kathy Anderson and was represented by Thomas Kuiper. Employer's Exhibit 1 was received.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time beginning on March 13, 2013, and his last day worked was September 21, 2016. He was initially hired for the Security Department and transferred into a position as a Dealer in June 2014. The claimant felt his co-workers and supervisors treated him differently due to his race. On August 10, 2014, Shift Supervisor Jeff Wagner told the claimant in front of two white co-workers that he would have to get his lunch from the back of the kitchen after another employee told the claimant he would have to ride in the back of the bus. The claimant did not report the incident to anyone in management. In November 2014, the claimant did report to the Shift Supervisor that several pit bosses had yelled at him in front of customers.

The claimant continued to report disagreements he had with his supervisors about the way they ran their shifts. He did not specifically report that he felt he was being treated differently based on his race. In December 2015, the claimant was told he could not work overtime. He went up the chain of command and reported the issue to Director John Tharp. Tharp told the claimant

that only 6:00 a.m. shift people were getting the overtime. The claimant disagreed with this reason. The following day, the claimant was allowed to work the overtime.

The claimant also had attendance issues during his employment. The employer has an attendance policy which states after 12 points or absences an employee can be subject to termination. Employees were responsible for notifying Security Dispatch if they were going to miss work. The claimant always notified Security Dispatch of his absences.

The claimant missed work on January 25, 2016 because the day before the supervisor had another employee open a table and told the claimant to tap out another dealer in another part of the casino. The claimant felt this was disparate treatment. On February 23, 2016, the claimant missed work for personal reasons. The claimant was tardy on April 8, 2016 as he was delayed on his walk to work due to a train. He missed work on April 18, 2016 due to illness. The claimant missed work on April 24 and 25, 2016 for his mother's birthday. He missed work on May 23, 2016 for personal reasons.

The claimant missed work on June 3, 2016 due to illness. On June 7, 2016, he received a documented verbal warning related to attendance. He was notified that eight occurrences would result in a written warning.

The claimant missed work on July 13, 2016 for personal reasons. On July 20, 2016 he received a written warning related to attendance. He was notified that ten occurrences would result in a final written warning.

The claimant was late to work on July 26, 2016 due to a delay in his walk because of the train. He was given another written warning reminding him that ten occurrences would result in a final written warning.

The claimant missed work on August 8, 2016 due to illness. On August 19, 2016, the claimant was late to work due to a delay in his walk caused by the train. On August 21, 2016, the claimant was given a final written warning as he had reached ten occurrences. He was notified that he would be terminated if he reached 12 occurrences.

On September 2, 2016, the claimant was late to work due to a delay in his walk to work caused by the train. At some point during the month of September, the claimant was speaking with a pit boss and used the word "finna." She told him that only people from the south and black people use that word. The claimant did not report his conversation with the pit boss to anyone. The same month, Lance Carnahan became Director of Table Games and the claimant's direct supervisor. He met individually with each employee in the Department, including the claimant. The claimant told Carnahan during the meeting that he did not like how his supervisors ran their shifts, but did not report he felt treated differently by his supervisors based on his race.

On September 23, 2016, the claimant called into work for personal reasons. He felt he was being discriminated against and did not believe the employer would be able to fix the issues. He did not report the issues to Human Resources or anyone above his Director. He did not contact the anonymous whistle blower line to report any of his issues. The claimant knew missing work that day would result in his discharge. He did not tell the employer he quit. Following his absence, Carnahan notified him that he was discharged for attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit his employment but was discharged due to job-related misconduct. Benefits are denied.

Iowa unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left his employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It 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). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

In this case, the claimant did not express an intention to the employer to sever the relationship. While he understood that missing work would result in the end of his employment, he did not tell the employer he intended to quit. The claimant was discharged from his employment.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id*. Iowa regulations define misconduct:

> "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.

Iowa Admin. Code r. 871-24.32(1)a. 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)…accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.*

The first issue is whether the claimant's absences were excessive. He had a total of 14 absences during 2016. His absences were excessive. The next issue is whether the claimant's absences were excused.

The claimant had three absences related to illness; those absences are considered excused as they were properly reported and reasonable. The rest of the claimant's absences were unexcused. He missed two days for his mother's birthday which were absences for personal reasons. The claimant was tardy to work on four occasions due to a train crossing delaying his arrival at work. An employee's commute is an issue of personal responsibility and is not excused. Finally, the claimant had five absences related to issues of personal reasons which are not considered excused. The claimant has argued that his final absence along with his other personal absences should be excused he believed he was being subjected to racial discrimination. However, given that he did not report the specific issues to management and only made general complaints about his supervisors, just missing work was not a reasonable response to the situation. The claimant had a total of 11 unexcused absences.

An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits; however, an employer is entitled to expect its employees to report to work as scheduled or to be notified as to when and why the employee is unable to report to work. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The October 13, 2016, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits

are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Stephanie R. Callahan
Administrative Law Judge

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Decision Dated and Mailed

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