**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**DAVID P HANSEN**
Claimant

**PRAIRIE MEADOWS RACETRACK & CASINO INC**
Employer

**APPEAL NO. 08A-UI-07160-DT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 07/06/08 R: 02**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

David P. Hansen (claimant) appealed a representative's August 6, 2008 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 21, 2008. The claimant participated in the hearing. Gina Vitiritto appeared on the employer's behalf. During the hearing, Claimant's Exhibit A was 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?

**FINDINGS OF FACT:**

The claimant started working for the employer on February 13, 2006. He worked full time as a floater between greeting captain and parking valet. His last day of work was June 30, 2008.

On June 30, the claimant was working from 2:00 p.m. to 12:30 a.m. At approximately 7:22 p.m. the claimant advised the dispatcher that he had received a call from his wife because of some mental health problems that were occurring with the claimant's son, and that he had to leave. The dispatcher was the only person in any authority on duty at that time, and was the person who handled such issues during that period. On July 1, at approximately 11:30 a.m., prior to the beginning of the claimant's shift, he called the security guard office as required and reported that he would not be in to work that day due to personal business, and that he would not be back until July 3.

The information regarding the claimant's call in on July 1 was not properly communicated to the employer's management. He was considered to be a no-call/no-show for July 1 and July 2. On July 3, the claimant came in during the morning to pick up his paycheck prior to his shift.

Another dispatcher on duty saw him and advised him that he no longer had a job. The claimant attempted to speak with a human resources representative, but the person to whom he tried to speak was otherwise occupied. He then left the facility and called back to the human resources department, and was able to speak to Ms. Vitiritto, Human Resources Manager. She advised him that he was considered to have abandoned his job by being a two-day no-call/no-show under the employer's policies.

On June 18, 2008, the employer had given the claimant a 90-day probation for attendance. The warning indicated the claimant had nine attendance points since August 21, 2007. The majority of the incidents were due to illness or family medical emergency, although there was one tardy (0.5 point) on October 21, 2007 for unknown reasons.

**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 he quit by job abandonment under the employer's two-day no-call/no-show policy. The intent to quit can be inferred in certain circumstances. For example, a three-day no-call/no-show in violation of company rule is considered to be a voluntary quit. 871 IAC 24.25(4). The employer's policy does not comply with this rule, however, as it infers an intent to quit after only two days. Since the employer's policy does not satisfy the rule as far as what can be deemed a voluntary quit under Iowa Code Chapter 96, the claimant's actions did not demonstrate the intent to sever the employment relationship necessary to treat the separation as a "voluntary quit" for unemployment insurance purposes. Further, the evidence does not support the conclusion that the claimant in fact did not call on July 1 for that day and July 2. 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 his attendance. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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. Absences due to properly reported illness or other good cause outside the claimant's control cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007). Prior to June 20 the claimant only had a half point that would not be considered excused for purposes of unemployment insurance benefits. Even treating his absence from work from the evening of June 30 through July 2 as being unexcused, the claimant's absenteeism was not for "excessive unexcused" reasons. 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.

**DECISION:**

The representative's August 6, 2008 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 he is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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