

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

ALASHRAF M HASSAN

Claimant,

and

MARZETTA FROZEN PASTA INC

Employer.

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HEARING NUMBER: 11B-UI-02283

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Alashraf M. Hassan, worked for Marzetta Frozen Pasta, Inc. from November 9, 2008 through May 10, 2010 as a full-time production worker who speaks little to no English. (Tr. 5, 31) His hours were usually from 3:00 p.m. until 11:30 p.m., Mondays through Fridays, and some Saturdays. (Tr. 5, 31)

One Saturday in September of 2009, the claimant was required to work at the plant. (Tr. 19) Mr. Hassan disagreed with his assignment that day for religious reasons, i.e., he was fasting for the Muslim holyday and couldn't drink water, which was of concern since he was directed to work the line next to the cooker. (Tr. 19-20, 38-42) The claimant requested to work in a cooler, another line, but was denied.

(Tr. 40, 46, 56-57) Mr. Hassan believed he was being treated unjustly because of his faith. (Tr. 38-39, 45-46) By the time Mr. Bowers (Human Resources Manager) got to the area, the claimant had already been sent home. (Tr. 20, 46)

The employer issued a first written warning to the claimant regarding this incident, which the employer considered insubordination. (Tr. 12, 18) Mr. Hassan was also suspended for three days, which would remain on his employment record for a year. (Tr. 11-12) The employer's progressive disciplinary policy allows the employer to skip a step depending on how serious a violation is. (Tr. 12) The claimant did not dispute the employer's discipline in any manner. (Tr. 22)

On April 28, 2010, the employer held a paid pre-shift meeting in which managers spoke to the claimant's entire shift and office personnel about the upcoming union vote. (Tr. 6, 15, 31, 46, 58, 67) Employees were not allowed to speak until after the manager or supervisors finished speaking; if an employee had questions, the employee must raise his hand, and the supervisor would call on them. (Tr. 6-7, 16-17) After the Vice President of Operations (Terry Warren) spoke (Tr. 34), Mr. Hassan raised his hand several times. (Tr. 46-47) Production Manager (Roland Kern) told the claimant that no questions would be answered until after the meeting. (Tr. 7, 16, 23, 33-34, 49, 65) The claimant knew from past such meetings that questions were never taken. (Tr. 47) Mr. Hassan was upset and did not sit down until a co-worker walked him into the hallway to calm him. (Tr. 8, 14, 35, 48, 50)

When the claimant returned to the meeting area, he raised his hand, again, indicating he had questions. The employer approached him and directed him to leave the area and go to the Human Resources office. (Tr. 9, 35, 48-49, 62) Mr. Hassan obliged without incident. (Tr. 17, 18, 51, 54-55, 57) He was told to go home and that there would be an investigation into his behavior at the meeting for which the employer would get back to him about their course of action. (Tr. 10, 36)

The investigation lasted approximately two weeks, as the employer interviewed several witnesses at the meeting and gathered statements. (Tr. 10) In the meantime, Mr. Hassan tried to unsuccessfully contact the employer since he hadn't heard anything from them in over a week. (Tr. 38) The employer terminated Mr. Hassan for 'gross misconduct' via a certified letter dated May 15, 2010. (Tr. 26, 31, 67)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

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 Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

Both parties agree that Mr. Hassan raised his hand several times during the meeting to ask questions as all the employees had been directed to do. However, the employer's version that the claimant was belligerent, i.e., shouting and yelling (essentially out of control) is unsubstantiated, as the employer failed to provide any firsthand witnesses. The claimant vehemently denies such behavior, and in fact, abided by the parameters set up by the employer.

Mr. Hassan provided credible testimony that in past meetings, when employees had questions, the employer routinely put off questioning until after the meeting and then failed to entertain them. Perhaps, Mr. Hassan over-reacted by getting excited over some of the employer's comments; but this could reasonably be attributed to the language barrier coupled with the fact that the employer was obviously not going to let him voice his questions or concerns.

The evidence does not support that his behavior was insubordinate. Mr. Hassan left the meeting room when asked, and did so in a peaceful and cooperative manner. The court in Henecke v. Iowa Dev. Of Job Service, 533 N.W.2d 573 (Iowa App. 1995) found substantial evidence supported misconduct where the claimant made threats to the claimant's supervisors; see also, Myers v. Employment Appeal Board, 462 N.W.2d 734 (Iowa App. 1990) wherein the court held that a claimant's use of profanity and threatening, "I will make it so miserable they will fire me," was disqualifying misconduct. In yet another case, the court held that substantial evidence supported the employer's case where a claimant was terminated for instigating a confrontation with another employee, which led to a physical altercation. Savage v. Employment Appeal Board, 529 [N.W.2d](#) 640, 642 j(Iowa Ct. App. 1995)

None of these factors (verbal threats, profanity, profanity directed at a superior) existed in this case, which could have strengthened the employer's position. Mr. Hassan did not threaten, nor cuss at anyone; he obediently complied when directed to go to the Human Resources office where he was later told to go home. The claimant even tried to return to work when he heard no response from the employer. While the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the claimant's version of events. And assuming arguendo that the claimant shouted during the meeting, at worst, we would conclude that it was an isolated instance of poor judgment that didn't rise to the legal definition of misconduct.

DECISION:

The administrative law judge's decision dated March 28, 2011 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, he is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Monique F. Kuester

AMG/fnv