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

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| **BEATRIZ ORDAZ SANCHEZ**<br>Claimant<br><br>**SWIFT PORK COMPANY**<br>Employer | **APPEAL 17A-UI-06197-NM-T**<br><br>**ADMINISTRATIVE LAW JUDGE DECISION**<br><br>**OC: 05/28/17**<br>**Claimant: Appellant (1)** |

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 15, 2017, (reference 01) unemployment insurance decision that denied benefits based upon her voluntary quit following three consecutive days of failing to report to work and notifying the employer of the reason. The parties were properly notified of the hearing. A telephone hearing was held on July 5, 2017. The claimant participated and testified with the assistance of a Spanish language interpreter from CTS Language Link. The employer participated through Assistant Human Resource Manager Emily Pottorff. Employer's Exhibits 1 and 2 were received into evidence.

**ISSUE:**

Did claimant voluntarily leave the employment with good cause attributable to the employer or did 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: Claimant was employed full time as a general laborer from July 1, 2013, until this employment ended on May 4, 2017, when she voluntarily quit.

On April 28, 2017, claimant's work authorization document, which allowed her to work legally in the United States expired. Two months prior to this the employer had advised claimant that her work authorization was going to expire and she needed to get it renewed. Claimant understood it was against the law for her to work in the United States and illegal for the employer to continue to allow her to work without valid work authorization. Claimant had not renewed her work authorization by April 29, 2017. Claimant has an immigration attorney but did not contact him until sometime after April 29, 2017.

Claimant was scheduled to work April 29 and May 1 through 4, 2017. Claimant did not report to work or call in any of these dates. Claimant testified she stopped reporting to work at this time

because someone with the employer, Sergio, told her she did not need to call on while she was awaiting renewal of her work authorization. Adams testified it is generally the policy of the employer to require employees to continue to call in to report absences during gaps in their employment authorization. Adams further testified she spoke directly with Sergio regarding this matter and he indicated he specifically advised claimant that she needed to continue to call in while waiting for her renewed work authorization.

The employer has a policy in place which states employees are considered to have voluntarily quit after three consecutive no-call/no-shows. Claimant was given a copy of this policy with her employee handbook upon her hire. Accordingly, claimant was separated from employment on May 4, following five consecutive shifts where she did not come to work or call in to report her absence. Prior to separating her from employment several unsuccessful attempts were made to contact claimant. Pottorff testified she was unaware of any further attempts made by the claimant to contact the employer. Claimant testified she contacted the employer after several weeks, once she received her work authorization card, but was told she had been separated from employment.

**REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant's separation from the employment was without good cause attributable to the employer.

Iowa Code §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.

Iowa Admin. Code r. 871-24.25(4) 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 § 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 § 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether

the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. Inasmuch as the claimant failed to report for work or notify the employer for more than three consecutive workdays in violation of the employer policy, the claimant is considered to have voluntarily left employment without good cause attributable to the employer.

Even if claimant had not voluntarily quit, she would have nevertheless been disqualified from receiving benefits based on disqualifying misconduct when she failed to ensure she had valid work authorization.

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).

The employer has the burden of proof in establishing disqualifying job misconduct. *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 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). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. Employing an individual who is not legally authorized to work in the United States is illegal. Claimant understood it would be illegal for her to work or for the employer to continue to allow her to work without proper work authorization. The claimant was advised by the employer 60 days prior to her work authorization expiring that her card was set to expire. Claimant has an immigration attorney, but did not take steps to contact her attorney about her work authorization, until after her card expired.

In *Altimaux v. Plumrose USA, Inc.*, Hearing Number 12B-UI-13394 (2013), the Employment Appeal Board considered the question of whether the claimant's failure to take timely steps to renew work authorization constituted misconduct in connection with the employment. The Board reasoned as follows:

> Given the claimant's status as a non-U.S. citizen, it was incumbent upon him to maintain a current and valid work authorization card. Having gone through the process of obtaining an updated one for, at least, the past several years renders him culpable for having 'dropped the ball' in this instance. While, at first blush, it may seem like an isolated instance of poor judgment, we find his behavior blatantly negligent and disregarding of the employer's interests. The claimant's loss of employment was directly attributable to his failure to take care of an important personal and legal responsibility to himself and to the employer. This case can be likened to the claimant in *Cook v. Iowa Department of Job Service*, 299 N.W.2d 698 (Iowa 1980) wherein the claimant in *Cook* lost his insurability because of traffic tickets he accumulated. The court held that said loss was self-inflicted and disqualifying misconduct. So, too, does the Board hold that Mr. Altimaux's loss of work status in the United States, and subsequent employment, was self-inflicted due to his failure to timely update his work authorization card.

The weight of the evidence establishes that the claimant's failure to take timely steps to apply for reauthorization of her employment authorization document was in willful disregard of the employer's interests and constitutes disqualifying misconduct in connection with the employment.

**DECISION:**

The June 15, 2017, (reference 01) unemployment insurance decision is affirmed. The claimant voluntarily left the employment without good cause attributable to the employer. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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