IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSE GONZALEZ
Claimant

TYSON FRESH MEATS INC
Employer

APPEAL NO. 11A-UI-11363-WT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/24/11
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated August 17, 2011, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 19, 2011. Claimant participated personally. Employer participated by Cris Travis, Employment Manager. Employer Exhibit A, pages 1-6, were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds the following facts. Mr. Gonzalez worked as a full-time production laborer for Tyson from March 23, 2010 to July 19, 2011. Claimant presented for work on July 19, 2011 but his hands were hurting. His supervisor told him that if he had not already clocked in, he should go home. If he had already clocked in, he should see the nurse. The claimant went home. Claimant was discharged on July 25, 2011 by employer for job abandonment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

871 IAC 24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

871 IAC 24.32(4) provides:

> (4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct. Mr. Gonzalez testified that Saul Carrillo told him to go home if he was not already clocked in. Ms. Travis, who had no first-hand knowledge of any of the events, testified that Mr. Gonzalez was told to wait until he had seen the nurse. She reviewed the statement of the manager, Julian Fernandez. (Emp. Ex. A, p. 2). She also reviewed the statement of Saul Carrillo, shift B supervisor. Mr. Carrillo indicated in a statement that Mr. Gonzalez was told to wait until 3:00 to clock in and then see the nurse. It is possible there was a miscommunication. Neither Mr. Fernandez, nor Mr. Carrillo were available to testify. Had they testified, the fact dispute may have been clarified. Based upon the evidence which is in the record, however, it is found that Mr. Gonzalez left work because he was told by Mr. Carrillo he could leave if he had

not punched in. There is simply no explanation why Mr. Gonzalez would walk off the job on the 19th and then report back the following morning.

Mr. Gonzalez did return to work the following day as he was instructed. This is strong proof that he was not abandoning his job or intentionally walking away from his obligations. He saw the nurse. He was not allowed to clock in and he was suspended without pay on the 20th and, ultimately, he was fired on July 25, 2011 without any further investigation by the employer. The reason listed on his termination report was "job abandonment." (Emp. Ex. A, p. 5).

Yet, Ms. Travis disputed the employer's documentation that the reason for the termination was "job abandonment." She testified under oath that Mr. Gonzalez had not engaged in job abandonment, but rather, he had engaged in "walking off the job." While she did not provide a specific work rule for this, she insisted that walking off the job results in immediate termination.[1] As stated previously, the evidence in the record established that Mr. Gonzalez did not walk off the job. He understood that he could leave if he had not clocked in. He did so and then he reported for work the next day.

It is noteworthy that when Mr. Gonzalez reported for work the following day, he was apparently questioned by Mr. Carrillo and Mr. Fernandez. They accused him of walking off the job and documented that he gave no explanation for this. (Emp. Ex. A, pp. 2-3). To this extent, their statements are incredible, particularly when compared to Mr. Gonzalez's live, first-hand testimony which was subjected to cross-examination. Even if the employer's hearsay evidence were accepted as the facts of the case the employer still did not prove misconduct. At the very worst, the claimant misunderstood the directive he was given by Mr. Carrillo. Even if true, this would not be misconduct.

The greater weight of evidence, however, suggests a truth which is even more disturbing. When this case is viewed as a whole, the greater weight of the evidence suggests that Mr. Carrillo and Mr. Fernandez wrote false statements in order to justify the termination of Mr. Gonzalez who had just claimed a work-related injury. As such, there is no misconduct.

DECISION:

The fact-finding decision dated August 17, 2011, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

_____
Joseph L. Walsh
Administrative Law Judge

_____
Decision Dated and Mailed

jlw/pjs

[1] It is noted that the employers third party administrator claimed in the appeal letter that the claimant quit. The employer is found to be not credible on the basis of its inconsistent statements.