

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AIDA P LOPEZ
Claimant

APPEAL NO. 09A-UI-19298-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SCHENKER LOGISTICS INC
Employer

**Original Claim: 06/14/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated December 15, 2009, reference 03, which denied unemployment insurance benefits based upon her separation from Schenker Logistics, Inc. After due notice was issued, a telephone hearing was scheduled for and held on February 4, 2010. The claimant participated personally. Participating on behalf of the claimant was Mr. Charles Pierce, attorney at Legal Aid Society. The employer participated by Ms. Nicki Brick, human resource generalist. Official interpreter was Gulieta Navarro.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Aida Lopez was employed by Schenker Logistics from July 24, 2006, until November 19, 2009, when she was discharged for violation of company policy. Ms. Lopez worked as a full-time case picker operator (order filler) and was paid by the hour. Her immediate supervisor was Joel Shenefield.

Ms. Lopez was discharged from her employment with Schenker Logistics when company management believed that she had violated a serious safety rule by throwing an object at another motorized pallet operator on November 15, 2009. The employer considered Ms. Lopez's actions to constitute a violation of its Class 3 safety rules, which can result in immediate termination from employment. A decision to terminate Ms. Lopez was based upon a report made by the claimant's supervisor and the claimant admitting some involvement in the incident.

During the incident in question, Ms. Lopez and a coworker had just returned from break and were preparing to operate their motorized pallet jacks. Ms. Lopez noted a very small plastic bottle of Scope mouthwash laying on the warehouse floor and picked it up. When her coworker inquired as to what the claimant had picked up, Ms. Lopez responded that it was "Scope" and tossed the object to her coworker. A few minutes later, the claimant's supervisor questioned

Ms. Lopez about throwing an object, and the claimant believed that she had satisfactorily explained what had happened. The claimant was asked to prepare a written statement. The claimant did so in English, although she had requested to read the document and to make her statement in Spanish, her native language. Ms. Lopez was cautioned by her supervisor not to do it again and agreed. The claimant considered the matter closed. Four days later, however, she was discharged from employment after company management reviewed the reports and determined the claimant had engaged in a serious violation of the company's safety rules.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant a discharge of an employee may not be necessarily serious enough to warrant the denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa App. 1992).

Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer does not furnish available evidence to corroborate the

allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this case, the evidence in the record establishes that the claimant was discharged based upon her supervisor's report to management and management's interpretation that the claimant's conduct constituted a serious safety violation warranting immediate discharge. During the hearing of this matter, the employer presented hearsay evidence about the claimant's conduct on November 15, 2009. While hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony.

Ms. Lopez testified under oath that she did not throw an object at another worker while the worker was operating a motorized pallet jack device but that she merely tossed a small plastic bottle of Scope to a coworker in response to his inquiry as to what the claimant had picked up off the floor. The claimant further testified that before tossing the bottle to her coworker, who was only a few feet away, Ms. Lopez stated, "Catch it," to ensure that the coworker was aware that she was tossing the bottle to him in answer to his inquiry.

Based upon the claimant's sworn direct testimony, the administrative law judge concludes that the claimant's conduct was not sufficient to warrant the denial of unemployment insurance benefits. Ms. Lopez did not reasonably believe that her conduct would violate a company safety rule or endanger another worker. The claimant's intent was not to damage client property, but only to show a coworker what she had picked up off the floor.

The question before the administrative law judge is not whether the employer has a right to discharge Ms. Lopez for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Act. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the administrative law judge concludes, based upon the evidence in the record, that the claimant's conduct was an isolated instance of poor judgment that did not rise to the level of disqualifying misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated December 15, 2009, reference 03, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw