

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIGUEL A PAREDES

Claimant

APPEAL NO: 07A-UI-00721-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

**OC: 12/10/06 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

Section 96.5-1-c – Voluntary Leaving/Care of Ill or Injured Family Member

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's January 3, 2007 decision (reference 02) that concluded Miguel A. Paredes (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 6, 2007. The claimant participated in the hearing. Kris Travis appeared on the employer's behalf. 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 April 12, 2005. He worked full time as a production worker/forklift operator on the first shift in the employer's Columbus Junction, Iowa pork slaughter and processing facility. His last day of work was November 3, 2006. The employer discharged him as of November 27, 2006. The reason asserted for the discharge was job abandonment.

In October the claimant had submitted a request for vacation time off; his initial request was for November 6 through November 13 and was approved. Before the end of October, the claimant contacted the general supervisor several times indicating that he needed to have off for a month, through December 8, because he was needed to go to Mexico to care for his brother who would be having a surgery. A statement was faxed from the hospital or doctor in Mexico to the employer to verify the need for the claimant to be present. The general supervisor did not initially give the claimant a direct response to his request to extend his vacation. However, on November 3 at the end of the claimant's shift he went to the general supervisor's office to get an answer. He was told to wait for the general supervisor to return to the office, but when the

general supervisor did not return for some time, another manager spoke to the general manager on the radio within the claimant's hearing; the general manager said that the claimant could go ahead and go to Mexico, that he would fix the paperwork, but that the claimant should call before he returned to work.

The claimant then left and departed for Mexico, driving, and arrived approximately November 15. The brother's surgery was approximately November 16. After the surgery the claimant transported the brother to his home and provided personal care through approximately November 28. On November 28 the claimant called from Mexico to the general supervisor and reported that he was ready to return to Iowa and to work. The general supervisor told the claimant that he had changed his mind about extending the claimant's vacation time and that the claimant's job was terminated due to job abandonment. The claimant then spoke to someone else with the employer who indicated that the job abandonment was not yet final and that the claimant should come to work on December 11 to attempt to return to work. The claimant did report to the facility on December 11 but was then advised that the separation for job abandonment was considered final.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

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).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Unexcused absence from work, including for an unapproved vacation, can constitute misconduct, however, to be misconduct, the absence must be unexcused. Cosper, supra. Because the claimant reasonably relied upon the general supervisor's verbal agreement to extend the vacation request. Therefore, the absence after November 13 does not constitute a final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

In the alternative, treated as a voluntary quit by job abandonment, the result is the same. If the claimant voluntarily quit his employment, he is not eligible for unemployment insurance benefits unless it was for good cause attributable to the employer.

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. The claimant expressed an intent to return to work with the employer. A voluntary leaving of employment requires an intention to terminate the employment relationship. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). However, an intent to quit can be inferred if a claimant fails to return after an approved period of vacation. 871 IAC 24.25(25). If the general supervisor had not approved the extension to the vacation leave and the claimant did not return at the end of the approved vacation period, he would be disqualified for unemployment insurance benefits unless he voluntarily quit by failing to return for good cause.

Treated as a job abandonment/voluntary quit, the claimant would have the burden of proving that the voluntary quit was for a good cause that would not disqualify him. Iowa Code § 96.6-2.

Iowa Code § 96.5-1-c 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. But the individual shall not be disqualified if the department finds that:

c. The individual left employment for the necessary and sole purpose of taking care of a member of the individual's immediate family who was then injured or ill, and if after said member of the family sufficiently recovered, the individual immediately returned to and offered the individual's services to the individual's employer, provided, however, that during such period the individual did not accept any other employment.

The claimant has satisfied these requirements, including that he sought to return to work, but no work was made available to him. A voluntary quit can be for good cause attributable to the employer even if the employer is free from any negligence or wrongdoing. Raffety v. Iowa Employment Security Commission, 76 N.W.2d 787 (Iowa 1956); Shontz v. IESC, 248 N.W.2d 88 (Iowa 1976). Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's January 3, 2007 decision (reference 02) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. In the alternative, he has demonstrated he quit for a non-disqualifying reason. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs