

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

ELVIRA ORTIZ  
207 SANTA BARBARA DR  
MARSHALLTOWN IA 50158

SWIFT AND COMPANY  
c/o EMPLOYER'S UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000

JOE WALSH  
ATTORNEY AT LAW  
840 – 5<sup>TH</sup> AVE  
DES MOINES IA 50309-1307

Appeal Number: 05A-UI-11693-AT  
OC: 10-02-05 R: 02  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Elvira Ortiz filed a timely appeal from an unemployment insurance decision dated November 4, 2005, reference 01, which disqualified her for benefits. Her former employer, Swift and Company, indicated that it did not intend to participate in evidentiary proceedings. With the consent of the claimant and her attorney, Joe Walsh, and with the assistance of interpreter Ike Rocha, a telephone hearing was held December 28, 2005. Claimant Exhibit A was admitted into evidence.

#### FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Elvira Ortiz was employed by Swift and Company from February 20, 1997 until October 5, 2005. Ms. Ortiz was a production worker. She was injured on the job on July 28, 2004. Immediately preceding the separation date, Ms. Ortiz had been released for light duty work in the glove room. She saw her physician, Dr. Kaspar on September 27. Dr. Kaspar continued her prior restrictions.

When Ms. Ortiz delivered the correspondence from Dr. Kaspar to the company nurse, the nurse indicated that she could not accept that statement. She later obtained another statement, prepared by someone other than Dr. Kaspar, indicating that Ms. Ortiz could move out of the glove room. She attempted to do so on October 5, 2005.

Ms. Ortiz experienced great pain. She told her supervisor who took her to the company nurse who, in turn, took her to the personnel office. Ms. Ortiz explained that she still could not perform the duties on the production line that were being assigned to her. The employer terminated the employment at that time.

#### REASONING AND CONCLUSIONS OF LAW:

The issue before the administrative law judge is whether the separation was an event which disqualifies the claimant for benefits. It was not.

Although the fact-finding decision indicated that the separation was a voluntarily quit, the administrative law judge finds no evidence in the record that Ms. Ortiz intended to sever the employment relationship. Her statements and actions on the date of separation were an attempt to return to the type of light duty work she had been performing. The employer declined to provide that work and initiated the separation. Such a separation is better characterized as a discharge.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). On the other hand, failure to perform a task does not constitute misconduct if the failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768 (Iowa App. 1982). The evidence in this record establishes that Ms. Ortiz attempted to perform the work as instructed. There is no evidence of bad faith in her report to her supervisor that she could not perform the tasks because of pain. The issue is not the appropriateness of the discharge but whether the discharge was for deliberate misconduct. The administrative law judge concludes that misconduct has not been established. Benefits are allowed.

#### DECISION:

The unemployment insurance decision dated November 4, 2005, reference 01, is reversed. The claimant is entitled to receive unemployment insurance benefits, provided she is otherwise eligible.

kkf/kjw