

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**DELSY P ORTEGA**  
Claimant

**SIOUX PREME PACKING CO**  
Employer

**APPEAL 21A-UI-09656-AR-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/21/2021**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

On April 5, 2021, claimant, Delsy P. Ortega, filed an appeal from the March 30, 2021, reference 01, unemployment insurance decision that denied benefits based upon the determination that the employer, Sioux-Preme Packing Co., discharged claimant for conduct not in the employer's best interests. The parties were properly notified about the hearing held by telephone on June 16, 2021. The claimant participated personally. The employer participated through Angel Magana, with James Williams and Rogelia Talamantes as employer's witnesses. Language Link provided interpretation services for claimant. Employer's Exhibits 1 through 8 were admitted to the hearing record.

**ISSUE:**

Did the employer discharge the claimant for job related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a food safety and quality assurance technician beginning on October 7, 2000, and was separated from employment on February 22, 2021, when she was discharged.

On February 17, 2021, claimant discovered that a scale was working incorrectly. She notified maintenance, but did not place a tag on the scale in order to note for others that the scale was not working properly. The employer's policy indicates that, in such situations, maintenance must be notified and the scale must be taken out of service by placing a tag on it. Another employee notified claimant's supervisor, Williams, of the issue. When Williams approached claimant to inquire about why the scale had not been tagged, claimant had no explanation.

Claimant had been progressing through the employer's progressive disciplinary policy since July 2020. In December 2020, she had been warned about failing to tag another piece of equipment that was out of order (Exhibit 7). Also in December 2020, she was warned that the next disciplinary action of a similar nature would result in her termination (Exhibit 6). At that time,

she was warned about releasing dirty equipment. The employer classifies all of the warnings claimant received between July 2020 and February 2021 as failures in the area of ensuring food safety. Though the disciplinary actions were written in English, discussions about the disciplinary actions were conducted with bilingual personnel. The employer did not need to translate for claimant as a general rule.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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.

Iowa Admin. Code r. 871—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 Dep't of Job Serv.*, 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 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, 394–95 (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. Specifically, claimant asserted that she simply did not have time to put a tag on the scale that was not working properly. However, the instructions for the employer's procedure are printed on the verification sheet claimant had used for years, and with which she was familiar. Additionally, claimant's assertion that she did not have time is not credible because it is unlikely to take much time to place a tag on a malfunctioning piece of equipment.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that claimant had been warned at least once within a few months of her termination for failing to tag a malfunctioning piece of equipment. Despite this warning, claimant again engaged in similar behavior, which resulted in the scale being used while it was malfunctioning. This is disqualifying misconduct.

## **DECISION:**

The March 30, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. 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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Alexis D. Rowe  
Administrative Law Judge

June 29, 2021  
Decision Dated and Mailed

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