

**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**

**ERNESTO LUJAN
915 E 6TH ST
MUSCATINE IA 52761**

**DOANE PRODUCTS COMPANY
C/o THOMAS & THORNGREN INC
PO BOX 280100
NASHVILLE TN 37228-0100**

**Appeal Number: 04A-UI-10645-RT
OC: 09-05-04 R: 04
Claimant: Appellant (1)**

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, 4th 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Ernesto Lujan, filed a timely appeal from an unemployment insurance decision dated September 24, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on October 21, 2004 with the claimant participating. The claimant was assisted by an interpreter, Rosamaria Paramo-Ricoy. Greg Schmidt, Plant Manager, and George David Showalter, second shift supervisor, participated in the hearing for the employer, Doane Products Company. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time packing operator or baler operator from July 23, 2001 until he was discharged on September 9, 2004. The claimant was discharged for insubordination when he failed to obey a direct order to go to work. On September 1, 2004, the claimant and a co-worker were sitting outside at a picnic table. They were not on a break or lunch period. The claimant's supervisor, George David Showalter, second shift supervisor and the employer's witness, paged all employees to come into the building to help clean and empty barrels from the extruder. There were ten employees, five of which were Hispanic and five white. Eight of the employees abided by the instructions of Mr. Showalter and came into the building and began working. Two of the employees, the claimant and another Hispanic, remained sitting at the picnic table. Mr. Showalter went out to the picnic table and asked both of them to go inside and go to work. They refused to do so and did not do so. The claimant was then suspended on that day and discharged on September 9, 2004 for insubordination in failing an order to go to work. Just two weeks earlier, a bin had hung up and the line was down which requires that employees go up and beat on the bin. Mr. Showalter instructed all of the employees to do so and they all did except for the claimant. The claimant went up tapped the bin once or twice and then left. The claimant had been working for four hours already but, nevertheless, told Mr. Showalter that he was sick and was going home and did so. The claimant received no warnings or disciplines for any similar behavior. There was no other reason for the claimant's discharge.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 9, 2004. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, George David Showalter, second shift supervisor, credibly testified that on September 1, 2004 he paged all of the employees under him, ten in total, five Hispanic and five white, to come inside the building and do cleaning and emptying of barrels. Eight of the employees responded and began to work. He further testified that the claimant and another Hispanic failed to do so. He went looking for them and found them sitting outside on picnic tables. They were not on a break or lunch. Mr. Showalter credibly testified that he asked them to go in the building and begin working. The claimant refused. The claimant was then suspended. The claimant's testimony to the contrary is not credible. The claimant at the hearing stated that he did not specifically refuse to work but was merely asking why he was picked on and not the whites. However, at fact-finding, the claimant stated that he did not return to the floor. This is in keeping with the testimony of Mr. Showalter. Further, of the ten employees, five were Hispanic and five were white and all were requested to go to work and three Hispanics did so.

Just two weeks earlier, the claimant had also refused to do work and went home. At that time a bin was hung up and the line was down and Mr. Showalter asked all of the employees on the line to go up and beat on the bin. They all did so except for the claimant. The claimant went up, tapped two times, and then told Mr. Showalter that he was ill and was going home and went home. However, the claimant had been at work for four hours and had not, prior to that time, said anything about being ill. The claimant's testimony that he was ill is not credible because he had been working for four hours and had no explanation as to why he did not go home sooner when he was ill.

The administrative law judge concludes that the refusal of the claimant to go to work when not on a lunch or break on September 1, 2004, when others, including Hispanics did, is a deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is disqualifying misconduct. Even the claimant conceded that if he was not on a break or lunch, it was his duty to be working. However, the claimant was not working; he was sitting outside on a picnic table. The second incident merely compounds the claimant's acts.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct, and, as a consequence, he is

disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

DECISION:

The representative's decision of September 24, 2004, reference 01, is affirmed. The claimant, Ernesto Lujan, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct.

tjc/kjf