

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ANA D LEMUS
Claimant

APPEAL NO. 19A-UI-02373-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROSE ACRE FARMS
Employer

OC: 02/24/19
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Rose Acre Farms (employer) appealed a representative's March 15, 2019, decision (reference 01) that concluded Ana Lemus (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 4, 2019. The claimant participated personally through Ivo Rivas, interpreter. The employer participated by Tami Ryerson, Human Resources Manager for the Iowa location. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 14, 2002, as a full-time dryer operator working 6:00 a.m. to 6:00 p.m. She signed for receipt of the employer's handbook on her date of hire and on June 28, 2018. The employer had no record of issuing the claimant any warnings prior to the final incident.

On Saturday, February 23, 2019, the claimant was working with three female co-workers and Second Supervisor Sheila. Second Supervisor Sheila had worked for the company approximately six months. At about 9:10 a.m. on February 23, 2019, Second Supervisor Sheila was using bad words and the claimant felt uncomfortable at work. Two American co-workers left early. The claimant and the other Spanish speaking worker stayed.

Second Supervisor Sheila left work and returned. She said things to the two workers like "Have a fucking day" and "You're Hispanic. That's why you're here." She said the two of them were going to "chingar", an offensive Spanish word. By 9:30 a.m. on February 23, 2019, the claimant decided she was too upset and afraid to stay at work. The claimant told Second Supervisor

Sheila she was going to leave in the best way she could communicate it. She said, "Me go right now. You very bad. Me go home right now". Second Supervisor Sheila spread her arms and legs and blocked the claimant and the co-worker from leaving for approximately five minutes. She spit on the two. Finally, she let them pass.

On Monday, February 25, 2019, the claimant was not scheduled to work but it was the first day the employer's main offices were open. She contacted human resources about Second Supervisor Sheila's behavior. They asked for her statement and notified her that they received it.

On Tuesday, February 26, 2019, the claimant arrived at work and Supervisor Rich Monthei asked to speak with her. He gave her three pieces of paper to sign. The documents were in English and she asked for an interpreter. He told her that he did not want to hear anything. Second Supervisor Sheila told him enough and this was her punishment. She was given the choice of signing or leaving. The claimant said she would not sign without knowing what the papers said. Supervisor Rich Monthei did not explain the documents or obtain an interpreter. He told her to go and she left.

One document was a corrective action dated February 24, 2019. It stated that the claimant was issued a five-day suspension, a demotion to packer with \$1.00 per hour reduction in pay. The employer notified the claimant that further infractions could result in termination from employment. The second document was a request for work transfer dated February 26, 2019 effective February 26, 2019, based on the demotion in her corrective action. Both documents were signed by Supervisor Rich Monthei. The third document was a warning for walking off the job on February 23, 2019. After she left, the claimant had the documents interpreted.

Supervisor Rich Monthei told the employer that the claimant did not appear for work or notify the employer of her absence on February 28, 2019. The employer terminated the claimant for absenteeism.

The claimant filed for unemployment insurance benefits with an effective date of February 24, 2019. The employer participated personally at the fact finding interview on March 14, 2019, by Kathleen Baute.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide sufficient evidence of job-related misconduct. It provided one incident of absenteeism. The claimant properly reported she was leaving on February 23, 2019, for an unsafe work situation. The employer's supervisor spit on her and blocked her passage for five minutes. She had good reason to leave.

On February 26, 2019, the supervisor instructed her to leave. After she understood the documents, it was clear she was either on a five-day suspension from February 26 to March 2, 2019, or terminated. She could not have been an absent without report on February 28, 2019. The employer never told her to return to work. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's March 15, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs