

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

NEIMA T LOROTO

Claimant

APPEAL 18A-UI-05200-LJ

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 04/01/18

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the April 24, 2018, (reference 02) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for performing unsatisfactory work, though she was capable of performing satisfactory work. The parties were properly notified of the hearing. An in-person hearing was held in Des Moines, Iowa, on June 7, 2018. The claimant, Neima T. Loroto, participated and was represented by Philip F. Miller, Attorney at Law. The employer, Swift Pork Company, participated via telephone through Emily Pottorff, Assistant HR Manager. Kunama/English interpreter Antonio assisted with the hearing. Employer's Exhibits 1 through 24 were received and admitted into the record over objection as to foundation. Claimant objected to the employer participating via telephone and asked for a continuance on the grounds of fundamental fairness. This objection was overruled and the continuance was denied. Pursuant to Iowa Administrative Code rule 871—26.6(4), witnesses may be permitted to participate via telephone in an in-person hearing. Claimant was granted a standing objection to all leading questions asked by the administrative law judge.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time, most recently as a general laborer on the cut floor, from July 5, 2016, until March 29, 2018, when she was discharged. Prior to March 2018, claimant suffered a work-related injury. For approximately five weeks prior to March 5, claimant worked in a light-duty position for the employer, easing back into work. On March 5, 2018, claimant had a final appointment with the doctor. During this appointment, the doctor released claimant to return to work. Claimant believed she was only released to return to light duty. The employer provided documentation showing claimant was instructed to minimize overhead work, including overhead reaching and horizontal reaching. (Exhibit 13) Claimant then returned to work. The employer explained that claimant began "work hardening" at that time, slowly easing back into working in her previous job using a knife. Claimant had difficulty reaching up for the knife she was required

to use and had difficulty moving her hands. She went to the office and reported these issues. On March 6, the employer again asked claimant to return to her knife position, and claimant again had physical difficulty performing the work. At that time, claimant was moved back to her light-duty position.

On March 27, claimant met with Pottorff. Pottorff asked claimant to try returning to her knife position for at least five minutes, and claimant refused. Pottorff explained to claimant that the employer wanted her to return to the position little by little so she could improve her health, and claimant again refused, telling Pottorff, "Do what you need to do, send me out, send me away." (Exhibit 9) Claimant explained that the line work required her to reach up high and move her arm up and down, and she was not able to do this. During this meeting, claimant was given a written warning for refusing to perform her job. (Exhibit 4) Claimant refused to sign this warning. There is no indication whether claimant was provided with a Kunama interpreter for either the verbal conversation or the written warning. On March 28, claimant returned to work. The employer sent her back to do her knife job, and she again refused, stating she was not able to perform the work without hurting herself. Therefore, claimant was discharged. Claimant denies she had any knowledge that her job was in jeopardy.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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).

An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See *Woods v. Iowa Department of Job Service*, 327 N.W.2d 768, 771 (Iowa 1982). "[W]illful misconduct can be established where an employee manifests an intent to disobey the reasonable instructions of his employer." *Myers v. IDJS*, 373 N.W.2d 507, 510 (Iowa 1983) (quoting *Sturniolo v. Commonwealth, Unemployment Compensation Bd. of Review*, 19 Cmwlt. 475, 338 A.2d 794, 796 (1975)); *Pierce v. IDJS*, 425 N.W.2d 679, 680 (Iowa Ct. App. 1988). In insubordination cases, the reasonableness of the employer's demand in light of the circumstances must be evaluated, along with the worker's reason for non-compliance. See *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa Ct. App. 1985). The key to such cases is not the worker's subjective point of view but "what a reasonable person would have believed under the circumstances." *Aalbers v. Iowa Department of Job Service*, 431 N.W.2d 330, 337 (Iowa 1988); accord *O'Brien v. EAB*, 494 N.W.2d 660 (Iowa 1993)(objective good faith is test in quits for good cause).

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, 394-395 (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, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds claimant provided credible testimony. The administrative law judge believes that claimant's position required her to repeatedly raise her arm over her head, in violation of her restrictions.

In this case, the employer discharged claimant for refusing to perform the position that she held prior to a work injury. Claimant provided credible, firsthand testimony that this job caused her

pain and required her to violate her work restrictions. The employer did not provide any firsthand testimony to refute this or to establish that the doctor knew claimant's full job duties when she was released to return to work. It is not reasonable to expect an employee to hurt herself just in an attempt to avoid being discharged. Under these circumstances, the administrative law judge believes a reasonable person would have acted as claimant acted. The employer has not established that claimant was discharged from employment due to disqualifying, job-related misconduct. Therefore, benefits are allowed.

DECISION:

The April 24, 2018 (reference 02) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn