

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARLOS E LIZANO
Claimant

APPEAL NO. 07A-UI-03375-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NORCROSS SAFETY PRODUCTS LLC
Employer

OC: 02/04/07 R: 04
Claimant: Appellant (1)

Section 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available for Work

STATEMENT OF THE CASE:

Carlos Lizano filed an appeal from a decision of a representative dated March 28, 2007, reference 01, which denied unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 18, 2007. The claimant participated with witness Beth Ann Lizano. The employer participated through Marcy Schneider, Hearing Representative and Kathy Lannen, Director of Human Resources.

ISSUES:

The issues in this matter are whether the claimant quit for good cause attributable to the employer, or whether the claimant was discharged for misconduct and whether the claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds that: The claimant worked for this employer from October 27, 2004 until January 12, 2007, when he began an approved leave of absence under the provisions of the Family Medical Leave Act. The claimant worked as a full-time warehouse worker and was paid by the hour.

Mr. Lizano applied for and was granted family medical leave to have surgery for a non-work-related condition beginning on January 12, 2007. The claimant applied for and was granted an extension of his leave of absence and has not returned to work at the time of hearing. Mr. Lizano has not been released without medical limitations, and therefore could not return to work with the company as his medical condition was not work related and the claimant has not been fully released by his physician. Mr. Lizano's intention is to return to employment with Norcross Safety Products and has not indicated any desire to relinquish his position with the company. The extension of the claimant's leave of absence granted by the employer expires on or about April 23, 2007 and the claimant may be removed from company employment rolls at that time if he is unable to return to work without limitations. The claimant

opened a claim for unemployment insurance benefits effective February 4, 2007 in an effort to supplement a small disability insurance payment that he receives while off work.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge in this case is whether Mr. Lizano is eligible to receive unemployment insurance benefits during the period in question. The administrative law judge finds based upon the evidence in the record that Mr. Lizano did not choose to voluntarily leave his employment with Norcross Safety Products. The evidence does not show that the claimant made any statement or took any action that would leave the employer to conclude Mr. Lizano was attempting to relinquish his position with the company. To the contrary, the claimant has maintained contact with the company and repeatedly attempted to return to work with less than a full medical release. The evidence also establishes that Mr. Lizano has not been discharged by Norcross Safety Products and remains on company employment rolls pending the claimant's ability to return to work with a full medical release upon the expiration of the extension of his Family Medical Leave Act that will take place on or about April 23, 2007. The claimant is advised to notify Iowa Workforce Development of his status with the company after a determination has been made by Norcross Safety Products on or about April 23, 2007 regarding his employment status with the company.

Although Mr. Lizano has not quit his employment and at the time of hearing has not been discharged by the employer, the evidence establishes that the claimant was placed upon an approved leave of absence, during the period in question at his request, and remains on leave of absence at the time of hearing. Thus, he is not able and available for work and ineligible to receive unemployment insurance benefits while he continues to be on a leave of absence status.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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.

For the reasons stated herein the administrative law judge finds that a separation from employment has not taken place at the time of hearing, the claimant has not quit his employment with this employer nor has the claimant been discharged. Mr. Lizano, however, is ineligible to receive unemployment insurance benefits for the period in question based upon his inability and unavailability for work while he continues to be on an approved leave of absence.

871 IAC 24.22(2)j(1)(2)(3) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

DECISION:

The decision of the representative dated March 28, 2007, reference 01, holding the claimant ineligible to receive unemployment insurance benefits is affirmed. Although the claimant has not been separated from employment, he remains on a leave of absence is not able and available for work within the meaning of the Iowa Employment Security Law until his status changes.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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