

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

XAVIER PEREZ
629 N GREEN
OTTUMWA IA 52501

EXCEL CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-06907-RT
OC: 06/05/05 R: 03
Claimant: Respondent (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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Excel Corporation, filed a timely appeal from an unemployment insurance decision dated June 20, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Xavier Perez. After due notice was issued, a telephone hearing was held on July 26, 2005, with the claimant participating. The claimant was assisted by an interpreter, Rosamaria Paramo-Ricoy. Mindy Ming, Assistant Human Resources Manager, participated in the hearing for the employer. 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, most recently as a full-time rib puller, from August 23, 2004, until he was discharged on May 25, 2005. On that day the general foreman, Dave Prose, believed that the claimant had intentionally thrown or slammed down a string puller believing it to be damaged but it was not damaged or broken. However, the claimant did not intentionally throw the string puller down. Rather, the claimant was attempting to hook the string puller up to a hook that is designed to hold a string puller and while doing so it accidentally fell to the stand upon which the claimant was standing. The stringer did not fall all the way to the floor. This was unintentional by the claimant. The claimant had never received any warnings or disciplines for any similar behavior. This was the only reason for the claimant's discharge.

Pursuant to his claim for unemployment insurance benefits filed effective June 5, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,254.00 as follows: \$322.00 per week for seven weeks from benefit week ending June 11, 2005, to benefit week ending July 23, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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 May 25, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, Mindy Ming, Assistant Human Resources Manager, credibly testified, but testified only from hearsay evidence of what she was told by General Foreman Dave Prost. Ms. Ming testified that Mr. Prost told her that he had observed the claimant slamming down or throwing down a string puller onto the stand upon which the claimant was sitting and then onto the floor. Ms. Ming further testified that when Mr. Prost confronted the claimant, the claimant said that he had done so because the string puller was broken, but the string was not broken or damaged. The claimant testified credibly that he did not throw the string puller on the floor but rather, while attempting to hook it up to the hook designed to hold the string puller, it accidentally and unintentionally fell on the stand upon which the claimant was standing. The claimant also offered hearsay evidence from a co-worker who had spoken to yet another co-worker who had observed the claimant and indicated that the claimant had not done this intentionally. The administrative law judge is constrained to conclude that the claimant's direct personal testimony outweighs the hearsay testimony of Ms. Ming. Accordingly, the administrative law judge is constrained to conclude that the claimant did not deliberately or willfully slam down the string puller but accidentally dropped it. Both parties concede that the claimant had never received any warnings or disciplines for similar behavior.

Based upon the record here, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant committed any deliberate act or omission constituting a material breach of his duties and obligations arising out of his worker's contract of employment or that evinced a willful or wanton disregard of the employer's interests or that was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. At most, the evidence establishes that the claimant committed an ordinary act of negligence in an isolated instance, but this is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for a current act of disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to

warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,254.00 since separating from the employer herein on or about May 25, 2005, and filing for such benefits effective June 5, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of June 20, 2005, reference 01, is affirmed. The claimant, Xavier Perez, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out his separation from the employer herein.

kjw/kjw