

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NORMA VALENCIA-BERNARDO
Claimant

APPEAL NO: 13A-UI-05289-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/31/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Norma Valencia-Bernardo (claimant) appealed a representative's May 3, 2013 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 3, 2013. The claimant participated in the hearing. Dzemal Grcic appeared on the employer's behalf. Anna Pottebaum served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for work-connected misconduct? Is the claimant able and available for work?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on July 2, 2007. She worked full time as a production worker on the first shift in the employer's Waterloo, Iowa pork processing facility. Her last day of work was July 17, 2013. The employer discharged her on that date. The reason asserted for the discharge was that her non-resident alien employment authorization expired on that date.

The claimant had made application on or about October 21, 2012 to renew her employment authorization document to the Department of Homeland Security, Bureau of Citizenship and Immigration Services. The renewal process typically had taken about three months. However, by January 17 she had not yet received her new employment authorization. Sometime after

January 17 she and an advocate contacted the federal Agency to inquire of the status of her application or the possibility of getting a temporary extension of her prior permit, but was told she would just have to be patient. There was no evidence that the claimant was in any way responsible for the delay in the issuance of the new employment authorization. However, as a result of the claimant's lack of a valid employment authorization as of January 17, the employer had no choice but to discharge the claimant.

On or about March 25, 2013, the claimant did receive her employment authorization, which was backdated to be effective January 17, 2013. The next day the claimant did contact the employer and inquired about returning to work, but was told that since more than 30 days had expired since January 17, the employer would not return her to her position. She then established a claim for unemployment insurance benefits effective March 31, 2013.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the expiration of the employment authorization. While it is correct that the employer had no choice but to remove the claimant from the employment, the employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

A situation such as that presented in this case regarding the lack of a valid employment authorization is better addressed as an issue of the claimant's eligibility for unemployment

insurance benefits as being able and available for work, as a person who has not received her timely requested renewal will be unemployed through no fault of her own (Iowa Code § 96.2), yet will not be able to satisfy the underlying requirements to receive unemployment insurance benefits; because without the authorization, she cannot work and cannot receive unemployment insurance benefits. Iowa Code § 96.5(10); 871 IAC 24.60. While the outcome will usually still be that the claimant is likely deemed ineligible to receive benefits for the period in which she was unemployed and without a valid work permit, it would be a temporary disqualification without the onerous impact that the person be required to earn ten times the weekly benefit amount in order to requalify for future benefit eligibility. Here, the claimant did not seek unemployment insurance benefits until after she did actually receive her renewed work permit, so there is no period of disqualification under her claim year. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's May 3, 2013 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. Effective March 31, 2013 the claimant was able and available for work. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs