

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

IRENE PANTOJA
Claimant

**DIA APPEAL NO. 22IWDUI0068
APPEAL 21A-UI-22017**

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

**OC: 8/29/2021
Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.19(38) – Definitions – Total, partial unemployment
Iowa Code § 96.4(3) – Eligibility – A&A – Able to, available for, work search

STATEMENT OF THE CASE:

On October 6, 2021, Irene Pantoja (claimant) filed a timely appeal from the October 4, 2021 unemployment insurance decision that found claimant was not eligible for benefits because she was still employed at the same hours and wages of her original contract of hire.

A telephone hearing was held on January 21, 2022 with the assistance of a Spanish language interpreter. The parties were properly notified of the hearing. The claimant participated and was represented by attorney Phillip Miller. Maria Rangel also testified on behalf of the claimant. The employer failed to participate.

ISSUE(S):

Whether the claimant is able and available for work.

Whether the claimant is still employed at the same hours and wages.

Whether the claimant is totally, partially, or temporarily unemployed.

Whether the employer's account is subject to charge.

FINDINGS OF FACT:

As a preliminary matter, the facts of this case are a little unclear due to the failure of the employer to participate in the hearing.

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant started with employer on or about May 20, 2017. Claimant worked fulltime, working forty hours per week Monday through Friday and worked overtime as available on Saturdays. Employer is a pork processing facility. At the facility, claimant's job was to use an electric razor and trim the pork butt as the meat came down the line.

On May 14, 2021, claimant underwent carpal tunnel and back surgery. Apparently, claimant had previously fallen on the job and injured her lower back. Claimant's doctor provided her with restrictions on her return to work to allow for a full recovery. Specifically, the doctor ordered claimant to work two hours per day in her first week back; four hours in the second week; six hours per week in third week; and back to eight hours per day in her fourth week back. This is what is called a "hardening program." Apparently, employer added one hour to her schedule above what the doctor ordered each week.

Beginning in mid to late June, claimant was back to working a fulltime schedule. She was dealing with pain and numbness in her hand. Claimant told employer that she was dealing with this pain but did not ask for any reduced hours. Claimant was told that she still needed to work faster. Claimant believed she was working faster but there was additional pain. On August 18, 2021, claimant was disciplined for her work performance. App ex. at p. 7. The disciplinary note indicates that she missed work for physical therapy. Id. When she was present, she was not trimming all the pork that came across the line, resulting in rework. Id. The note indicates that "any further issues of this nature will result in further disciplinary actions." Id. The note indicated a suspension. Id. Claimant credibly testified that on this day, August 18, 2021, employer took her key card and said they would call her back when they needed her but she should go home. However, they have never called her back since August 18, 2021 and she has not earned any wages there since, effectively ending her employment. Claimant wanted to continue with her employment at employer. She has not earned wages anywhere else either since separation.

Since her separation from employment, claimant has applied for many jobs including at Bath and Body Works, Family Dollar, Walmart, Menards, and Grocery Store La Salod among others. Claimant also has had multiple online meetings with Iowa Workforce Development to aid her job hunt. Probably complicating her search is that she is not a native English speaker. However, claimant is trying to secure employment and believes she is healthy enough to work in many different types of employment. This is confirmed by her doctor signing off on her to return to the fairly strenuous work on the pork processing line she was performing previously.

Ultimately, IWD denied claimant's request for unemployment benefits on October 4, 2021 as they found that she is still employed at her job with employer and she is still employed at the same hours and wages as within her original contract of hire.

REASONING AND CONCLUSIONS OF LAW:

For the reasons set forth below, the October 4, 2021 unemployment insurance decision that found claimant is ineligible is reversed and the claimant is eligible for benefits.

As an initial matter, the reasoning for denial is not supported by the facts of the case. Clearly claimant is no longer employed with Employer. They took her key card and have not given her any hours of work since August 18, 2021. As claimant was previously working forty plus hours per week; she obviously is no longer employed for the same hours and wages of her original contract of hire. Employer may have termed it a "suspension" but for all intents and purposes, claimant's employment was terminated on August 18, 2021. You cannot just indefinitely suspend someone, especially when there appears to be no intent to ever bring claimant back, to avoid terminating them and potentially having your account charged.

Iowa Administrative Code rule 871-24.1(113) characterizes the different types of employment separations as follows:

Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.

a. Layoffs. A layoff is a suspension from pay status initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

b. Quits. A quit is a termination of employment initiated by the employee for any reason except mandatory retirement or transfer to another establishment of the same firm, or for service in the armed forces.

c. Discharge. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, failure to pass probationary period.

d. Other separations. Terminations of employment for military duty lasting or expected to last more than 30 calendar days, retirement, permanent disability, and failure to meet the physical standards required.

Again, this judge is at a disadvantage because the employer failed to participate. However, this judge believes the separation of employment on August 18, 2021 can be deemed a "discharge." In their disciplinary note dated August 18, 2021, it is clear that employer was unsatisfied with the competence of claimant's work. They cited the amount of rework needed and her overall negative impact on the efficiency of the line. Further, this is also not a voluntary quit, claimant intended to continue working at employer. The next component is to determine whether there was any misconduct.

Employees discharged for misconduct are not eligible for unemployment insurance benefits. Iowa Code § 96.5(2)(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.

Iowa Admin. Code r. 871-24.32. Conduct asserted to be disqualifying misconduct must be both specific and current. *West v. Emp't Appeal Bd.*, 489 N.W.2d 731, 734 (Iowa 1992); *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659, 662 (Iowa Ct. App. 1988). Past acts of misconduct may be considered in determining the magnitude of current act. *Myers v. Emp't Appeal Bd.*, 462 N.W.2d 734 (Iowa App. 1990), *Flesher v. Iowa Dep't of Job Serv.*, 372 N.W.2d 230 (Iowa 1985). "Misconduct must be substantial in order to support a disqualification from unemployment benefits." *Henry v. Iowa Dept. of Job Service*, 391 N.W.2d 731, 734 (Iowa App. 1986).

The employer bears the burden of proving that a claimant is disqualified from receiving benefits because of substantial misconduct within the meaning of Iowa Code section 96.5(2). *Myers*, 462 N.W.2d at 737. Because our unemployment compensation law is designed to protect workers from financial hardships when they become unemployed through no fault of their own, we construe the provisions "liberally to carry out its humane and beneficial purpose." *Bridgestone/Firestone, Inc. v. Emp't Appeal Bd.*, 570 N.W.2d 85, 96 (Iowa 1997). "[C]ode provisions which operate to work a forfeiture of benefits are strongly construed in favor of the claimant." *Diggs v. Emp't Appeal Bd.*, 478 N.W.2d 432, 434 (Iowa Ct. App. 1991).

"Misconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant denial of unemployment benefits." *Henry*, 391 N.W.2d at 734. In fact, "[w]hat constitutes misconduct justifying termination of an employee, and what is misconduct which warrants denial of unemployment benefits are two separate decisions." *Brown v. Iowa Dept. of Job Service*, 367 N.W.2d 305, 306 (Iowa App. 1985). The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

In this matter, the employer has the burden to prove that benefits should be denied. The employer has failed to provide any evidence or testimony regarding any alleged misconduct and how it was detrimental to their interests. Here it is clear there was no misconduct. Claimant based on her back and hand pain was not able to work as swiftly and efficiently as employer would like. It appears that claimant could still perform the work, just not at the level and desired. As such, this

is just a case of claimant's work being inefficient and a failure of good performance due most likely to her hand and back injuries and surgeries. There is no misconduct.

Next we must determine whether claimant is able and available for work.

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.1A, subsection 37, paragraph "b", subparagraph (1), or temporarily unemployed as defined in section 96.1A, subsection 37, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(1)a provides:

Benefits 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.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

- a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

Iowa Admin. Code r. 871-24.22(2) 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. (2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be

tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23 provides various reasons a claimant could be disqualified from being considered unavailable for work but none seem to apply here. A doctor has released claimant to the vigorous job of working a pork processing line. It is clear that if claimant can perform that sort of manual work, she is more than capable of performing many different types of employment. It is also clear that based on the record and claimant's testimony, she is actively and earnestly seeking employment at many different types of work and employers. Claimant is able and available for work.

The next question is whether the claimant is totally, partially, or temporarily unemployed.

Iowa Code section 96.1A(37) provides:

"Total and partial unemployment".

a. An individual shall be deemed "totally unemployed" in any week with respect to which no wages are payable to the individual and during which the individual performs no services.

b. An individual shall be deemed partially unemployed in any week in which either of the following apply:

(1) While employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars.

(2) The individual, having been separated from the individual's regular job, earns at odd jobs less than the individual's weekly benefit amount plus fifteen dollars.

c. An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or

trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated.

In this case, claimant has not earned in wages at employer, or anywhere else, since August 18, 2021. As no wages have been paid to claimant since the date of separation with employer, claimant is "totally unemployed."

Because the separation was neither a voluntary quit without good cause nor a discharge for misconduct, the separation would not disqualify the claimant for benefits nor relieve the employer's account of liability for benefits. See Iowa Code section 96.5(1) and (2)(a) (regarding quits and discharges). The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

In conclusion and to briefly summarize all the issues presented.

Yes, claimant is able and available for work. She is physically able to perform most if not all types of employment. She is actively and earnestly seeking employment and has attended Iowa Workforce Development meetings to help with this endeavor. A doctor has signed off on her ability to work post-surgery.

No, claimant is not still employed at the same hours and wages. Claimant originally worked fulltime while also working overtime on many Saturdays prior to separation at employer. Claimant has not worked a single hour at employer since employer took her key card and sent her home on August 18, 2021. Claimant has not heard from employer since that date. Claimant was effectively discharged from employment. An employer cannot "suspend" an employee, take away their keycard, not provide them any hours of employment in over five months and claim she is still employed. The discharge was not due to misconduct but rather poor job performance and inefficiency after claimant suffered hand and back injuries with subsequent surgeries.

As claimant has not earned any wages since she was discharged from employment at employer, she is "totally unemployed."

As this what not a voluntary quit or discharge for misconduct, employer's account may be charged.

DECISION:

The October 4, 2021 unemployment insurance decision is REVERSED. Claimant is eligible to receive benefits, provided claimant meets all other eligibility requirements.

CC: Irene Pantoja, Claimant (by first class mail)
Philip Miller, Attorney for Claimant (by first class mail)
Talx UCM Services, Inc., Employer (by first class mail)
Natali Atkinson, IWD (by email)
Joni Benson, IWD (By AEDMS)

Case Title: IRENE PANTOJA V. SWIFT PORK COMPANY
Case Number: 22IWDUI0068
Type: Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to be 'TA' with a stylized flourish extending to the right.

Thomas Augustine, Administrative Law Judge