

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

Appeal Number: **04A-UI-01829-DT**
OC: 01/18/04 R: 02
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.

BERTA GARCIA
253 FRANKLIN AVE APT 22
DES MOINES IA 50314

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.

OSCEOLA FOODS CORPORATION
c/o JON-JAY ASSOCIATES INC
PO BOX 182523
COLUMBUS OH 43218-2523

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

STATEMENT OF THE CASE:

Osceola Foods Corporation (employer) appealed a representative's February 11, 2004 decision (reference 01) that concluded Berta Garcia (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 15, 2004. The claimant participated in the hearing. Judy Callahan appeared on the employer's behalf and presented testimony from one other witness, James Tucker. Rosemary Paramo-Ricoy 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

After previously working at the employer's location through a temporary employment firm, the claimant started working directly for the employer on June 9, 2003. She worked full time as a production worker/scale operator on the 3:30 p.m. to 12:00 a.m. shift in the employer's Osceola, Iowa food processing and manufacturing plant. Her last day of work was January 15, 2004. The employer discharged her on January 16, 2004. The reason asserted for the discharge was excessive absenteeism with an additional concern regarding work performance.

The employer's attendance policy normally provides for discharge of an employee who reaches five points during her six-month probationary period. On September 24, 2003, the claimant was given a warning that she was at four points due to three absences and two tardies. The claimant was then absent on November 17 for an unknown emergency, and on November 26 she was given an additional warning that she was at five points. She was then tardy on December 31, resulting in an additional half point.

At approximately 5:00 p.m. on January 2, 2004, the claimant's supervisor, Mr. Tucker, posted a notice that the crew was required to work an overtime shift on Saturday, January 3 from 3:30 p.m. to 12:00 a.m. The claimant did not remember that she had a problem until approximately 11:35 p.m., when, through an interpreter, she informed Mr. Tucker that she had a problem with her vehicle that she needed to take care of on January 3 so she would not be able to report for the overtime shift. Mr. Tucker responded that if she had let him know earlier in the shift he could have found another worker, but that at that time he had to insist that she report for the overtime. The claimant did not agree that she would report.

The claimant was a no-call/no-show on January 3. She was assessed an additional point, bringing her to six and one-half points. On January 5 she was issued a warning noting that she was at the six and a half point level. No further action was taken regarding her attendance until January 9. On that day Mr. Tucker sent an e-mail to the personnel department recommending that the claimant not be retained in her employment due to the attendance issues, particularly the January 3 incident, as well as a job performance issue on January 8.

On January 8, a large quantity of product had to be reprocessed because it had been underweight after being processed on the scale for which the claimant was responsible. There had not been any prior similar problems or any prior warnings regarding job performance. Action to discharge the claimant did not occur until January 16.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 Section 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).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or

- b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her attendance and the work performance issue. As to the work performance issue, a failure in job performance is not misconduct unless it is intentional. Misconduct connotes volition. Huntoon, supra. There is no evidence the claimant intentionally caused the problem with the underweight packaging. Rather, it was at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. As to the attendance issue, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). The most recent occurrence was over two weeks prior to the employer's discharge of the claimant, and the employer had already addressed the incident in its January 5, 2004 warning.

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.

DECISION:

The representative's February 11, 2004 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/b