

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

MAURO A GOMEZ

Claimant

APPEAL NO: 19A-UI-03391-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 03/31/19

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 19, 2019, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 13, 2019. The claimant participated in the hearing with Attorney David Loetz. The employer did not respond to the hearing notice and did not participate in the hearing. Claimant's Exhibits A through F were admitted into evidence. Claimant's Exhibits E and F were audio files that were emailed and cannot be included with the claimant's evidence because the Appeals Bureau does not have that capability.

ISSUE:

The issues are whether the employer discharged the claimant for work-connected misconduct and whether the claimant is able and available for work.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production worker for Swift Pork Company from April 16, 2018 to April 5, 2019. He was discharged for allegedly violating the employer's policy on harassment.

The claimant has a documented medical condition that required him to use the restroom more frequently than other employees (Claimant's Exhibit A). He also experienced a hog falling on him April 3, 2019, and needed to see the nurse twice per day for treatment.

On March 28, 2019, the claimant's co-workers Donald and Daniel complained the claimant took too long in the restroom, pointed at their watches and called the claimant "a lazy piece of shit." On April 1, 2019, Donald pushed the claimant while they were working. The claimant told his supervisor and the general foreman about the situation and they said they would look into it but the co-workers' behavior did not change. The claimant told his supervisor he needed to go to human resources but each time he tried to talk to human resources on his break or lunch period they were busy and he was unable to tell what was happening with his co-workers.

On April 4, 2019, the claimant went to the locker room and Donald and Daniel followed him. The claimant turned his phone on to record the conversation. Daniel asked the claimant if he had a problem with him and the claimant asked why they were coming to him in the locker room. Daniel said if the claimant had a problem with him they could take care of it "right now" and then punched a locker as he started to walk away. The claimant was fearful and felt threatened and Donald and Daniel said they were going to wait for the claimant outside. When the claimant went by human resources 30 minutes later Donald and Daniel were in there. The claimant took his recording to the union hall and went to human resources with a union representative April 5, 2019. He tried to play the recording of the conversation but the human resources representative said it was against the law. Human resources told the claimant Donald and Daniel said he was at the nurse's office for 90 minutes when he was actually there 25 minutes for treatment of his injuries from the hog falling on him and it refused to look at the video that would have shown how long he was gone. The employer then notified the claimant his employment was terminated for harassment. The claimant never received any verbal or written warnings for anything except attendance.

The claimant has a doctor's note allowing him to use the restroom when he needs to do so but does not have any other restrictions at this time.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer did not participate in the hearing and failed to provide any evidence. The evidence provided by the claimant does not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. The employer has not met its burden of proof.

Iowa Code § 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 96.19, subsection 38, paragraph "b", unnumbered paragraph (1), or temporarily unemployed as defined in section 96.19, subsection 38, 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".

While the claimant has a doctor's note requiring he be allowed to use the restroom as needed, he does not have any restrictions that prevent him from working and is considered able and available for work.

The employer has not established misconduct on the part of the claimant and he is able and available for work. Therefore, benefits are allowed.

DECISION:

The April 19, 2019, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason and is able and available for work. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/scn