IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JOSE A PIZANO
Claimant

OEL CONSTRUCTION SERVICES INC
Employer

APPEAL NO. 13O-UI-00268-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/03/12
Claimant: Appellant (2)

Section 96.5-1 - Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Jose Pizano (claimant) appealed a representative's October 22, 2012 decision (reference 02) that concluded he was not eligible to receive unemployment insurance benefits because he voluntarily quit work with OEL Construction Services (employer). Administrative Law Judge Nice issued a decision on November 29, 2012, affirming the representative's decision. A decision of remand was issued by the Employment Appeal Board on January 9, 2013. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 5, 2013. The claimant was represented by Joseph Powell, attorney at law, and participated personally through Blanca Jadlow, interpreter. The employer participated by Chad McDonald, Vice President; Jennifer Ingledue, President; Blake Owens; Project Superintendent: Trinitee Halbur, Foreman; and Joshua Boyles, Lead Foreman.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on May 14, 2011, as a full-time seasonal laborer. This was the claimant's second season of employment with the employer. The claimant signed for receipt of the employer's English handbook on May 18, 2012. The claimant does not read English. The employer did not issue the claimant any written warnings during his employment.

On October 2, 2012, the foreman started yelling at the claimant in English. The claimant did not understand why the foreman was yelling at him. The foreman told the claimant to go home and the claimant understood he was being fired. The lead foreman and the project superintendent heard what the foreman was saying to the claimant. The incident was reported to the employer the following day. The employer did not call the claimant to tell him to return to work. The claimant considered himself terminated. The employer argues that the claimant voluntarily quit work when he did not return to work after having been sent home.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons the administrative law judge concludes he did not.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant did not have any intention to leave work. The claimant was told to leave work by the employer. The claimant's separation is not voluntary.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Inasmuch as employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer provided only one incident of failure to follow the employer's instructions. It did not supply sufficient evidence of job-related misconduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's October 22, 2012 decision (reference 02) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs