IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANTONIO SANCHEZ
Claimant

FAREWAY STORES INC
Employer

APPEAL NO. 07A-UI-02015-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/14/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Antonio Sanchez (claimant) appealed a representative's February 21, 2007 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Fareway Stores, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 14, 2007. The claimant participated in the hearing. Kim Garland appeared on the employer's behalf and presented testimony from one other witness, Brian Brownrigg. During the hearing, Claimant's Exhibit A was entered into evidence. 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:

The claimant started working for the employer on February 21, 2005. As of approximately June 2006, he worked part time as a meat cutter in the employer's Perry, Iowa store. His normal work schedule was Monday, Wednesday, and Friday from 6:00 p.m. until close between 9:00 p.m. and 9:30 p.m. His last day of work was December 4, 2006.

On or about December 1 the claimant mentioned to the assistant manager in the meat department that he might be going out of town the next week to be gone through the end of the year. The claimant worked on December 4; then on or about December 5 called the store, seeking to speak to Mr. Brownrigg, the meat department manager. Mr. Brownrigg was not available, so the claimant spoke again to the assistant department manager. He explained that he was planning on leaving town on or about December 11 and that he had initially planned on working his shifts on December 6 and December 8, but that it appeared that since he had a lot of work he needed to do both on his other full-time job and at home to get ready, he was wanting to find someone else to cover those shifts. The assistant manager agreed and indicated he would pass along the information to Mr. Brownrigg. The claimant had previously

been told that if he needed to call in for time off, at least on an incidental basis, that he could get approval either from the assistant manager or Mr. Brownrigg.

The assistant manager did not bring this information to Mr. Brownrigg's attention until on or about December 11. At that time, since the claimant had not followed the proper procedure to get approval for vacation time directly from the department manager at least one week prior to the intended vacation time, Mr. Brownrigg determined that the claimant's job would be terminated for job abandonment and that he would be replaced.

When the claimant returned to Perry shortly after the first of the year and contacted the store, he was told by the assistant manager that he needed to speak to Mr. Brownrigg regarding his employment. When Mr. Brownrigg returned from vacation several days later, the claimant contacted him and was informed that he had been replaced.

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).

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 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 alleged job abandonment by failing to follow proper procedures to obtain permission before leaving on a period of vacation. Critical to the determination of this issue is the role of the assistant manager and the credibility of his statements. The claimant provided a signed statement from the assistant manager dated February 27, 2007; a copy of this statement was sent by the Appeals Section to the employer on March 5, 2007 in preparation for the hearing. (Claimant's Exhibit A.) In that statement the assistant manager acknowledges that he told the claimant he would take care of getting his shifts covered, that "I gave the ok" to the claimant's being off work through the end of the year, but that "next time we needed some more notice," and that he would let Mr. Brownrigg know. During the hearing, the employer responded that it also had a signed statement from the assistant manager dated in mid-December 2006 which differed considerably from the February 27 statement, including an assertion that he had not given any approval for the time off but rather that specifically told the claimant that he needed to get clearance or approval directly from Mr. Brownrigg.

As of approximately mid-January 2007, this assistant manager no longer works for the employer. While the employer might no longer have as easy access to compel the former assistant manager's direct participation in the hearing, it at least knew or should have known upon its prehearing receipt of the former assistant manager's February 27 statement that it was extremely different from the statement it had from December 2006. However, the employer took no action to prepare to rebut the more recent statement in the hearing by either sending in a copy of the December statement or seeking a subpoena to compel the participation in the hearing of the former assistant manager. The employer simply argues that the December 2006 statement should given more weight, as it was closer in time to the actual events and would reflect a clearer recollection of the events. While a statement made contemporaneously to an event is frequently given weight over a statement made at a more distant time because of the fact of fading memories, other credibility issues can impact that weight. In this case, given the drastic discrepancies between the two statements, it does not appear so much that the former assistant manager's memory of the events blurred over time, but that he is now completely repudiating his prior statement. There is no suggestion that the assistant manager provided his February 2007 statement to the claimant under any form of duress, pressure, or incentive; on

the other hand, it is conceivable that December 2006 statement was provided as it was because the assistant manager realized at that time that he should not have given approval and that he should have told the claimant to get the approval directly from Mr. Brownrigg, and realized that if he acknowledged giving approval that he might get himself into trouble, and so gave his statement to reflect how he "should have" handled the situation, rather than how he in fact did handle it.

The claimant's firsthand testimony is consistent with the recitation of the events as set out in the former assistant manager's February 27, 2007 statement. The employer has no first-hand information regarding the communications between the claimant and the former assistant manager, but relies exclusively on the former assistant manager's statements to Mr. Brownrigg in December, which have now been called into question. The administrative law judge concludes that the claimant's version of the events is established as more credible.

While the claimant should have gotten approval to be off work on vacation directly from Mr. Brownrigg, his reliance on the apparent authority and approval from the assistant manager was a good-faith error in judgment or discretion. While the employer may have had a good business reason for replacing the claimant, 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 21, 2007 decision (reference 02) is reversed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw