IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PATRICIA A DE-ESPADA
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL NO. 10A-UI-03204-S2T

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 01/17/010
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Rembrandt Enterprises (employer) appealed a representative's February 22, 2010 decision (reference 01) that concluded Patricia Espada (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14 and 15, 2010. The claimant was represented by Mary Hamilton, Attorney at Law, and participated personally through Patricia Vargas-VerPloeg, Interpreter. The employer participated by James Perkins, Safety Director, and Susan Slagle, Assistant Manager of Human Resources. Nancy Anduiano observed the hearing.

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 having considered all of the evidence in the record, finds that: The claimant was hired on January 22, 2007, as a full-time sanitation worker. The claimant signed for receipt of the employer's Spanish handbook on July 9, 2009. The claimant cleaned machinery that either had acid or chlorine running through the sanitation pipes. The claimant had frequent training and understood she should not mix acid and chlorine. The employer issued the claimant a written warning on October 1, 2007, for tardiness. On February 7, 2008, and June 11, 2009, the employer issued the claimant written warnings for performance issues. On February 16, 2009, the employer issued the claimant a written warning for not reporting an accident. The claimant received the documents, but did not understand three of them, because they were written in English. The claimant understood the one warning written in Spanish, her first language. She cannot read English. The claimant had suffered two work-related injuries during her employment. At the time of her separation, she had not completed her recovery.

The employer had a Federal Handbook recommending which chemicals should be used on each day. The claimant understood she was to follow the handbook. The employer understood the handbook as a recommendation. Each day, the employer decided which chemical to use.

Employees were to ask each day which chemical to use. The claimant understood that the supervisor would announce or write down the chemical to be used.

On January 14, 2010, the claimant attended training regarding the danger of mixing acid and chlorine. The supervisor wrote down that acid was to be used. Later that day, the claimant used acid along with other co-workers. A co-worker, Rafael, was using chlorine after being given permission to do so by the supervisor. The employer terminated the claimant on January 14, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

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). Misconduct connotes volition. A failure in job performance which results from inability or incapacity is not volitional and therefore not misconduct. Huntoon v. Iowa Department of Job Services, 275 N.W.2d 445 (Iowa 1979). The employer discharged the claimant for a performance issue and has the burden of proof to show evidence of intent. In this case, the claimant was certain that her supervisor told her to use a certain chemical. The employer's witness was not present when this occurred. The

employer did not provide any evidence of intent at the hearing, just lack of understanding of the supervisor's instructions. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's February 22, 2010 decision (reference 01) is affirmed. The employer has not met its burden of 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/kjw