IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SANJUANA TANNER
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL NO. 08A-UI-02603-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/10/08 R: 03
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.6-3 – Postponements

STATEMENT OF THE CASE:

West Liberty Foods, L.L.C. (employer) appealed a representative's March 10, 2008 decision (reference 01) that concluded Sanjuana Tanner (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 April 15, 2008. The claimant participated in the hearing and was represented by Tom Duff, Attorney at Law. Sarah Franklin, Attorney at Law, appeared on the employer's behalf. 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.

ISSUES:

Should the employer's request for a postponement of the hearing been granted? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

Upon the employer's appeal, by an initial hearing notice issued to the parties on March 19, 2008 a hearing in this matter had been set for 2:00 p.m. on April 1, 2008. The claimant and her attorney responded to the hearing notice by contacting the Appeals Section and providing telephone numbers were they could be reached for the hearing. The employer failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing. When the administrative law judge contacted the claimant and Mr. Duff at the time for the April 1 hearing, as it appeared that the employer was not pursuing its appeal, the claimant and her attorney agreed that the administrative law judge should enter a default affirmance decision on the record. After the administrative law judge had released the claimant and Mr. Duff from the hearing call but before 2:10 p.m., the employer contacted the Appeals Section seeking to participate in the hearing. The administrative law judge attempted to recontact the claimant and Mr. Duff, but they were no longer available. However, the administrative law judge advised the employer that even though the employer had not properly called in prior to the hearing, given the timing of the employer's call, the record would be reopened and the hearing would be rescheduled for a later date in approximately two

weeks, to which the employer agreed. On April 2 a new hearing notice was issued setting the new time and date for the hearing as 9:00 a.m. on April 15.

On April 11 the employer responded to the April 2 hearing notice by contacting the Appeals Section and providing the names and number for three witnesses it indicated would be available to participate at the scheduled date and time for the hearing. However, on April 14 at approximately 3:24 p.m. an attorney on behalf of the employer made the first contact with the Appeals Section indicating that the employer was seeking a postponement of the April 15 hearing and indicating that at least two of the employer's witnesses were not available to participate. The administrative law judge spoke with Attorney Sarah Franklin on behalf of the employer at approximately 4:23 p.m. on April 14 regarding the employer's request. No showing of extreme emergency was made. The administrative law judge denied the request for postponement. At the time for the hearing on April 15 the administrative law judge did attempt to contact the employer's witnesses, but they were not available.

The claimant started working for the employer on May 5, 1981. Most recently she worked full time as a team leader. Her last day of work was February 11, 2008. The employer suspended her that day and discharged her on February 19, 2008. The reason asserted for the discharge was not being present or taking preventative action regarding a near-miss accident on February 11.

While most positions in the employer's operation require the wearing of gloves, there is a machine in the claimant's area, a gizzard skinner, for which the wearing of gloves poses the risk of the gloves getting caught in the machine. The claimant's routine was to instruct or remind employees that she was assigning to that machine that they could not wear gloves on the machine. On February 11 an employee from another area but who had worked on the gizzard skinner multiple times in the past was assigned by another crew leader to work on the gizzard skinner. The claimant did not speak directly to this employee, but observed that as he went to the machine he was not wearing gloves.

The claimant proceeded with her duties covering workstations of line employees as they went on break, and then processing payroll information for departments at a computer at least 30 feet away from the gizzard skinner. The employee working on the gizzard skinner worked on the machine for approximately two hours, during which he also went on a half-hour lunch. At some point apparently after returning from lunch he had donned gloves; a glove then did get caught in the machine. The claimant responded immediately to the report of the accident, but no actually injury was suffered.

The employer suspended her at that time pending the results of an inquiry into the accident. She was then discharged for failing to warn or remind the employee not to wear gloves, not being present to observe the wearing of gloves or prevent the accident, and not posting warning labels or stickers on the machine. The employer had never advised the claimant that the posting of warning labels or stickers was her responsibility; members of higher management, including the employer's safety team, were previously aware of the potential hazards of that machine.

REASONING AND CONCLUSIONS OF LAW:

The first issue which must be addressed is the employer's request for postponement of the hearing less than 24 hours prior to the scheduled hearing time.

Iowa Code § 96.6-3 provides:

> 3. Appeals. Unless the appeal is withdrawn, an administrative law judge, after affording the parties reasonable opportunity for fair hearing, shall affirm or modify the findings of fact and decision of the representative. The hearing shall be conducted pursuant to the provisions of chapter 17A relating to hearings for contested cases. Before the hearing is scheduled, the parties shall be afforded the opportunity to choose either a telephone hearing or an in-person hearing. A request for an in-person hearing shall be approved unless the in-person hearing would be impractical because of the distance between the parties to the hearing. A telephone or in-person hearing shall not be scheduled before the seventh calendar day after the parties receive notice of the hearing. Reasonable requests for the postponement of a hearing shall be granted. The parties shall be duly notified of the administrative law judge's decision, together with the administrative law judge's reasons for the decision, which is the final decision of the department, unless within fifteen days after the date of notification or mailing of the decision, further appeal is initiated pursuant to this section.
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> Appeals from the initial determination shall be heard by an administrative law judge employed by the department. An administrative law judge's decision may be appealed by any party to the employment appeal board created in section 10A.601. The decision of the appeal board is final agency action and an appeal of the decision shall be made directly to the district court.

871 IAC 26.8(3), (4) and (5) provide:

> Withdrawals and postponements.
>
> (3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.
>
> (4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.
>
> (5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

871 IAC 26.8(2) provides:

> (2) A hearing may be postponed by the presiding officer for good cause, either upon the presiding officer's own motion or upon the request of any party in interest. A party's request for postponement may be in writing or oral, provided the oral request is

> tape-recorded by the presiding officer, and is made not less than three days prior to the scheduled hearing. A party shall not be granted more than one postponement except in the case of an extreme emergency.

The employer did not request the postponement within three days prior to the hearing, and the reason for the request was not of such an emergency nature as would excuse a failure to have made a timely request for a postponement. Further, the employer had in essence already been granted a postponement by virtue of the need to reschedule the April 1 hearing due to the employer's failure to properly follow the instructions on the hearing notice to participate in that hearing. The employer's late request to postpone the hearing was properly denied.

Turning to the separation issue, 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 § 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.
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> (1) Definition.
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> 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 was what they felt was her responsibility for the near-miss accident on February 11, 2008. While it was the claimant's normal practice to remind employees to not wear gloves on that machine, the employer has not established that this was an perpetual duty of the claimant, or that she was obliged to continually monitor the machine operator to ensure that the operator did not don gloves, or that it was her responsibility to post a notice for the machine. Under the circumstances of this case, the claimant's failure to remind the employee about not wearing gloves or to be close enough at all times to observe that he was wearing gloves 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. 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 March 10, 2008 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 she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/css