

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

VICTOR M LOPEZ-MARTINEZ
Claimant

ABM ONSITE SERVICIES MIDWEST INC
Employer

APPEAL 17A-UI-11986-H2

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 10/22/17
Claimant: Appellant (1R)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 16, 2017, (reference 02) unemployment insurance decision that denied benefits. The parties were properly notified about the hearing. An in-person hearing was held on December 12, 2017 in Des Moines, Iowa. Claimant participated with the assistance of Iliana Aguilar, Spanish interpreter. Employer participated through Brooke Hupke, Account Manager; Jackie Sciorrotta, Account Supervisor and Jeri Martin, Recruiter and was represented by Katie Raisch, attorney at law. Employer's Exhibits 1 through 4 were entered into the record.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

Was the claimant legally able to and available for work in the United States effective October 12, 2016?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as a utility worker beginning on February 1, 2016 through October 12, 2016 when he was discharged due to his inability to work legally in the United States. When he was hired the claimant presented the employer with his employment authorization card that had an expiration date of October 12, 2016. As a courtesy to the claimant on September 23, 2016 the employer sent a reminder letter to the claimant that his authorization would expire on October 12 and the employer would need written documentation from him on or before that date in order to legally allow him to continue working in the United States. The claimant never presented any written documentation allowing him to continue working in the United States. He was discharged by the employer because he could no longer legally work in the United States.

The claimant established a claim for benefits with an effective date of October 22, 2017. His potential weekly benefit amount is \$308.00. At hearing he alleged that he had been working for

a new employer, El Maizalito of The North, Inc. from February 2017 through October 2017. He has no wages from that employer showing up in his wage records maintained by the agency. Claimant alleges that he earned almost twenty-one thousand dollars from that employer, but the three paycheck stubs he has reveal total earnings of approximately \$3,076.00 as of June 23, 2017. The claimant also alleged that as of June 23, the supervisor Eduardo, (last name unknown) began paying him in cash and no paycheck stubs were given to him.

The contact information for the employer on the claimant's last paycheck stub is El Maizaloito of the North, Inc. 1155 Gordon Combs Road, NW, Marietta, Georgia 30064. The telephone number listed is (676) 355-5279. The employer's local office in Des Moines is located at 2800 7th Street, Des Moines, Iowa 50313.

No fact-finding interview has been held on the claimant's separation from El Maizaloito of the North, Inc. The claimant is seeking to have wages he earned from that employer added to his base period.

The claimant did not obtain legal permission to work in the United States again until January 30, 2017. The claimant was not legally allowed to work in the United States from October 12, 2016 until January 30, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

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).

Claimant did not rebut employer's reason for the separation. Claimant knew he had to maintain legal permission to work in the United States including making timely application for his Employment Authorization Card. The employer could not legally continue to employ him once he no longer had legal authority to work in the United States. The claimant's failure to maintain his legal permission to work in the United State is misconduct sufficient to warrant a denial of benefits.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work from October 12, 2016 until January 30, 2017.

Iowa Code section 96.5(10) provides:

10. Aliens—disqualified. For services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for the purpose of performing such services, or was permanently residing in the United States under color of law at the time such services were performed, including an alien who is lawfully present in the United States as a result of the application of the provisions of section 212(d)(5) of the Immigration and Nationality Act. Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits. In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to such individual are not payable because of the individual's alien status shall be made except upon a preponderance of the evidence.

Iowa Admin. Code r. 871-24.60(2)a-c provides:

Alien. Any person who is not a citizen or a national of the United States. A national is defined as a person who lives in mandates or trust territories administered by the United States and owes permanent allegiance to the United States. An alien is a person owing allegiance to another country or government.

(2) It is required that information designed to identify illegal nonresident aliens shall be requested of all claimants for benefits. This shall be accomplished by asking each claimant at the time the individual establishes a benefit year whether or not the individual is a citizen.

a. If the response is "yes," no further proof is necessary and the claimant's records are to be marked accordingly.

b. If the answer is "no," the claimant shall be requested to present documentary proof of legal residency. Any individual who does not show proof of legal residency at the time it is requested shall be disqualified from receiving benefits until such time as the required proof of the individual's status is brought to the local office. The principal documents showing legal entry for permanent residency are the Form I-94 "Arrival and Departure Record" and the Forms I-151 and I-551 "Alien Registration Receipt Card." These forms are issued by the immigration and naturalization service and should be accepted unless the proof is clearly faulty or there are reasons to doubt their authenticity. An individual

will be required to provide the individual's alien registration number at the time of claim filing.

c. Any or all documents presented to the department by an alien shall be subject to verification with the immigration and naturalization service. The citizenship question shall be included on the initial claim form so that the response will be subject to the provisions of rule 24.56(96), administrative penalties, and rule 871-25.10(96), prosecution on overpayments.

Iowa Code section 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".

Iowa Admin. Code r. 871-24.22(2)o provides:

24.22(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

o. Lawfully authorized work. An individual who is not lawfully authorized to work within the United States will be considered not available for work.

Claimant was not lawfully authorized to work within the United States from October 12 2016 until January 30, 2017, thus he is not considered able to and available for work during that period. The claimant shall be considered able to and available for work effective January 30, 2017.

REMAND:

The issue as to whether the claimant has unreported insured wages that should be included in his base period is remanded to Iowa Workforce Development Department – Field Audit of the Tax Bureau, for an investigation and determination.

The issue of the claimant's separation from his last employer, El Maizaloito of the North, Inc. is remanded to the unemployment insurance service center for an initial review and determination.

DECISION:

The November 16, 2017, (reference 02) decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. Inasmuch as no benefits were claimed or paid, no overpayment applies. The claimant was not able to and available for work from October 12, 2016 until January 30, 2017.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/rvs