

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MOHAMED O ADAM
Claimant

APPEAL NO: 13A-UI-14300-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AGRISTAR MEAT & POULTRY LLC
Employer

OC: 12/08/13
Claimant: Respondent (2/R)

Section 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge
871 IAC 24.32(9) – Suspension or disciplinary layoff

STATEMENT OF THE CASE:

Mohamed O. Adam (claimant) appealed a representative's December 26, 2013 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Agri Stare Meat & Poultry (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 23, 2014. The claimant participated in the hearing. Diane Guerreo appeared on the employer's behalf. Karim Allin served as interpreter. 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 there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on January 1, 2012. He worked full time as a laborer in the employer's poultry cut up department. His last day of work was December 5, 2013. The employer suspended him on that date.

The employer suspended the claimant because of a report that he had an altercation on the evening with his foreman; the foreman had reported that the claimant had used vulgar language, saying "f - - - you," and had shoved him. The claimant denied the allegations, but the employer suspended him pending further investigation. The employer obtained statements from other employees suggesting that the claimant may have used the vulgar language, but was

unable to obtain any verification of the physical conduct. As a result, the employer determined to bring the claimant back from suspension.

On December 16 a representative of the employer met with the claimant and had him sign a form indicating that if there were further problems he was subject to immediate termination. He was to report back for work on December 17.

The claimant came back in to report for work on December 17. Before he started working, the same employer representative indicated that she needed to speak with the claimant regarding his work authorization. She advised him that it was due to expire on December 22, and she asked him if he had gotten a renewed authorization. He told her that he had not, but that he could show that his application had been submitted. She indicated that this was not sufficient. She therefore told him that as there would only be three days of work that week before the work authorization would expire, that he should not bother coming back to work, that he was discharged.

As of the date of the hearing in this matter, the claimant had not yet gotten an approved work authorization renewal.

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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

There are actually two separations which must be reviewed in this case. The first is the suspension which occurred on December 5, 2013; for purposes of unemployment insurance eligibility, a suspension is treated as a temporary discharge and the same issue of misconduct

must be resolved. 871 IAC 24.32(9). The reason cited by the employer for suspending the claimant is the alleged altercation with the claimant on December 4. The employer acknowledged that it was unable to obtain any information to corroborate that there had been any physical contact. As to the vulgar language, the claimant denied making the statement to the foreman as alleged. The employer relies exclusively on the second-hand account from other employees and the foreman; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken, whether they actually observed the incident, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant used the vulgar language toward the foreman. 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 as a result of the December 5 suspension separation.

The second separation occurred when the claimant returned from the suspension on December 17. A claimant is not eligible for unemployment insurance benefits if he quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that it was the claimant who chose not to return to work on that date because of the upcoming issue with his expiring work authorization. The claimant's first-hand testimony was that he was willing to return to work that day through the expiration of this work authorization but that it was the employer's representative who indicated to him that he could not. The employer relies exclusively on the second-hand account from the representative who spoke to the claimant on December 17; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether that representative might have been mistaken as to the claimant's responses to her, whether she is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of her report. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The reason cited by the employer for effectively discharging the claimant on December 17 is the upcoming expiration of his work authorization on December 22. While it is correct that the employer had no choice but to remove the claimant from the employment at the point that his work authorization did expire, absent some showing that he had failed to make a timely application for renewal after being reminded to do so by the employer, the failure to receive the renewed authorization before the expiration of the prior authorization is not misconduct on the part of 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 due to the December 17 separation from employment.

A situation such as that presented in this case regarding the lack of a valid employment authorization is more properly addressed as an issue of the claimant's eligibility for unemployment insurance benefits as being able and available for work, as a person who has not received his timely requested renewal will be unemployed through no fault of his own (Iowa Code § 96.2), yet will not be able to satisfy the underlying requirements to receive unemployment insurance benefits; because without the authorization, he cannot work and cannot receive unemployment insurance benefits. Iowa Code § 96.5(10); 871 IAC 24.60. While the outcome, particularly in a situation as that in this case, will usually be virtually the same, in so far as the claimant is likely deemed ineligible to receive benefits for the period in which he is unemployed, it would be a simple disqualification without the onerous impact that the person be required to earn ten times the weekly benefit amount in order to requalify for future benefit eligibility.

However, the issue as to whether the claimant was able and available for work after the expiration of his prior work authorization was not included in the notice of hearing for this case. Therefore, the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5). Benefits for weeks beginning December 22, 2013 shall not be released pending resolution of that issue.

DECISION:

The representative's December 26, 2013 decision (reference 01) is reversed. The employer did suspend and discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible. There is a question as to whether the claimant is otherwise eligible as of December 22, 2013 due to the expiration of his work authorization. The matter is remanded to the Claims Section for investigation and determination of the able and available issue. Benefits beginning December 22, 2013 should be held pending resolution of that issue.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs