

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

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**Appeal Number: 05A-UI-03685-RT
OC: 03-13-05 R: 01
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Ignacio Gonzalez, filed a timely appeal from an unemployment insurance decision dated April 4, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on April 28, 2005, with the claimant participating. The claimant was represented by W. E. Gene Collins, Attorney at Law. The claimant was assisted by an Interpreter, Guadalupe McCarney. Deb Shultz, Payroll Manager, participated in the hearing for the employer, Gleeson Constructors, L.L.C.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time employee from May 7, 2002 until he was separated from his employment on March 17, 2005. The claimant was working at a job site on that date and had just finished laying cement. He took a break and when he was finished with his break, he returned to work. He asked Kenny, who was somehow in charge of laying concrete or cement, if Kenny needed his help. Kenny said yes. The claimant was willing to help Kenny and began to help him. The foreman, Francisco Guzman, who was approximately 150 feet away, yelled at the claimant that he was not supposed to be there and to come over where Mr. Guzman was. The claimant went over to Mr. Guzman and told Mr. Guzman that Kenny had asked him to help. Mr. Guzman then asked Kenny if he needed the claimant's help and Kenny said he did. Mr. Guzman told the claimant to go help Kenny for awhile and then later to come back and help Mr. Guzman. Mr. Guzman told the claimant that from now on he was to ask Mr. Guzman what to do because Mr. Guzman was in charge of the job site. The claimant responded that he knew what he was supposed to be doing and he did not need to ask Mr. Guzman every minute. Mr. Guzman became upset and told the claimant that the claimant may well have to ask Mr. Guzman every minute what to do. The claimant said that he did not think it was necessary for him to check with Mr. Guzman every minute and if that was necessary, to go ahead and fire him. Mr. Guzman became more upset and began waving his right hand towards the door and said go and said something about good luck or good wishes and signaled again for the door. The claimant thought he was fired. The claimant assembled his personal things and then went to a trailer to sign out and while in the trailer said good bye to the secretary. The secretary said goodbye to the claimant. The claimant said yes he had been fired. He left the trailer and picked up his personal items when Mr. Guzman and the superintendent, Brian Tabbert approached the claimant. Mr. Tabbert asked the claimant where he was going. The claimant said he was going home because, pointing at Mr. Guzman, the claimant said he fired him. Mr. Tabbert asked why. The claimant tried to explain in English that he had a problem with Mr. Guzman and did not like the way Mr. Guzman was treating him. Mr. Tabbert asked him whether he liked it or not referring to the treatment of Mr. Guzman. The claimant said no and Mr. Tabbert told the claimant to go home. The claimant believed that he was discharged and left. The claimant was a good worker and had never received any warnings or disciplines. No one had specifically told the claimant that he was fired or discharged. The claimant had never expressed any concerns to the employer about his working conditions nor had he ever indicated or announced an intention to quit if problems he was having at work were not addressed by the employer.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The first issue to be resolved is the character of the separation. The employer's witness, Deb Shultz, Payroll Manager, testified that the claimant quit when he informed the Superintendent, Brian Tabbert that he would quit before doing what the Foreman, Francisco Guzman told the claimant to do. The claimant testified that he was discharged by Mr. Guzman when he told Mr. Guzman that he did not need to be told every minute what to do and Mr. Guzman told the claimant to go and showed him the door and then later when the claimant explained what had happened to Mr. Tabbert, Mr. Tabbert told the claimant to go home. Although the testimony of Ms. Shultz was credible, she testified only from hearsay and her testimony does not outweigh the credible direct testimony of the claimant. Accordingly, the administrative law judge concludes that the claimant was discharged, or at least he justifiably believed that he was discharged, on March 17, 2005.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. As noted above, the claimant and the Foreman, Francisco Guzman, had some kind of a disagreement. The administrative law judge concludes that the claimant's version is more credible than the hearsay version testified to by Ms. Shultz. The claimant was asked to help Kenny who was somehow in charge of laying concrete or cement. The discussion between the claimant and Mr. Guzman are set out in the findings of fact. The

bottom line is that Mr. Guzman objected to the claimant's assisting Kenny and told the claimant that the claimant was to ask Mr. Guzman what to do because he was in charge of the job site. The claimant said he knew what to do and did not have to ask Mr. Guzman every minute. Mr. Guzman responded that he might well have to and when the claimant heard this he said he should be fired if Mr. Guzman had to tell the claimant every minute what to do. Mr. Guzman then did so or at least led the claimant to justifiably believe that he was discharged.

When Mr. Tabbert came over, the claimant explained what had happened and Mr. Tabbert asked the claimant if he liked it or not, referring to Mr. Guzman and the claimant said no. Mr. Tabbert then told the claimant to go home. The administrative law judge notes that there is no evidence that the claimant specifically refused to do any task assigned to him by Mr. Guzman. The claimant was assisting Kenny and this initially caused Mr. Guzman to be upset. The claimant only told Mr. Guzman that he did not need to be told every minute of the day what to do. This is no doubt correct. Mr. Guzman took offense and told the claimant that he would tell or might tell the claimant every minute what to do and the claimant said you might as well fire me and Mr. Guzman did. Although the claimant's statements approach insubordination, the administrative law judge concludes that they really do not reach the point of insubordination. Again, the administrative law judge notes that the claimant never refused any instructions from Mr. Guzman. The claimant was merely stating an opinion about being told what to do every minute. Although this was probably not wise, the administrative law judge concludes that it was an isolated instance of negligence. There is no evidence that the claimant's behavior was a deliberate act or omission constituting a material breach of his duties or that it evinced a willful or wanton disregard of the employer's interest and is not disqualifying misconduct for those reasons. The question then becomes whether the claimant's act was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that here it does not. The evidence is uncontested that the claimant was a good worker and had never received any warnings or disciplines. Accordingly, the administrative law judge concludes that the claimant's behavior here was merely an isolated instance of negligence and is not disqualifying misconduct.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of April 4, 2005, reference 01, is reversed. The claimant, Ignacio Gonzalez, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

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