

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GABRIELA MARTINEZ
Claimant

APPEAL NO. 07A-UI-07630-C

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIMPSON MEMORIAL HOME INC
Employer

**OC: 07/08/07 R: 03
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Simpson Memorial Home, Inc. (Simpson) filed an appeal from a representative's decision dated July 30, 2007, reference 01, which held that no disqualification would be imposed regarding Gabriela Martinez' separation from employment. After due notice was issued, a hearing was held on October 29, 2007, in Davenport, Iowa. Ms. Martinez participated personally and was represented by Roland Caldwell, Attorney at Law. Exhibit A was admitted on Ms. Martinez' behalf. The employer participated by Clifford McFerren, Environmental Services Supervisor, and Shelly Wicks, Administrator. Tina Moncivais participated as the interpreter.

ISSUE:

At issue in this matter is whether Ms. Martinez was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Martinez began working for Simpson on May 31, 2006. She was last employed full time in the laundry. On or about May 26, 2007, she met with her supervisor and requested an extended leave to travel to Mexico to handle personal matters. She was told a position would be held for her in the housekeeping department if she returned in four weeks. She was told that her position in the laundry would have to be filled on a permanent basis due to her extended absence. Ms. Martinez was advised that she might have to work different schedules or different positions until a regular position in the laundry became available.

Ms. Martinez began the leave on June 18. She met with the supervisor on July 9 concerning what hours and position she would have when she returned. The employer had scheduled her for 32 hours beginning July 11 and ending July 15. The hours were split between laundry and housekeeping. Ms. Martinez was attempting to clarify with the supervisor where she was scheduled to work which days. He interpreted her statements as meaning she wanted to work in either laundry or housekeeping but not both. There was no interpreter present at the time. When he perceived that Ms. Martinez was becoming upset, the supervisor told her that was the best he could do and thanked her for her time.

Sensing that there may have been a misunderstanding, the supervisor called Ms. Martinez' son that same day and left a message indicating a possible misunderstanding. During the message, the supervisor indicated that Ms. Martinez no longer had employment with Simpson. When her son told her about the message, he only indicated that she no longer had employment. He did not tell his mother that she needed to contact the employer to clear up a possible misunderstanding about her job status. Ms. Martinez returned to full-time employment in the laundry at Simpson on September 4, 2007.

REASONING AND CONCLUSIONS OF LAW:

The parties disagree as to whether the separation was a quit or a discharge. A quit requires an intention to sever the employment relationship accompanied by some overt act of carrying out that intent. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). There was no evidence tending to establish that Ms. Martinez desired to stop working for Simpson. She did not report for scheduled work on July 11, because her son told her of the message from her supervisor to the effect that she did not have a job at Simpson. The employer's belief that she quit on July 9 was based on the conversation she had with the supervisor that day. There was no interpreter present to make sure there was a "meeting of the minds" as to what the employer was offering and what Ms. Martinez' response was to the offer. The fact that the supervisor called Ms. Martinez' son is indicative of his belief that there may have been a language barrier during the conversation on July 9.

The administrative law judge concludes that the employer initiated the separation in this matter when Ms. Martinez' son was told she no longer had a job. Therefore, it is considered a discharge. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Having taken the position that Ms. Martinez quit, the employer did not offer evidence of any misconduct on her part. The evidence of record does not establish any misconduct. Ms. Martinez did not refuse to perform the work offered on July 9; she only wanted to clarify where she would be working on which days. She did not deliberately or intentionally act in a manner she knew to be contrary to the employer's interests or standards.

For the reasons stated herein, the administrative law judge concludes that Ms. Martinez is not disqualified from receiving benefits.

DECISION:

The representative's decision dated July 30, 2007, reference 01, is hereby affirmed. Ms. Martinez was discharged, but misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw