

**IN THE COURT OF APPEALS OF IOWA**

No. 8-627 / 08-0288  
Filed October 29, 2008

**MARZETTI FROZEN PASTA, INC.,**  
Plaintiff-Appellant,

**vs.**

**EMPLOYMENT APPEAL BOARD,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Polk County, Karen A. Romano,  
Judge.

Employer appeals a ruling on petition for judicial review affirming the  
decision of the Employment Appeal Board and remanding to the Workforce  
Development Claims Division to address the issue of alien disqualification under  
Iowa Code section 96.5(10). **AFFIRMED.**

Jeffery W. Lanz, Huber, Book, Cortese, Happe & Lanz, P.L.C., West Des  
Moines, for appellant.

Richard Autry, Des Moines, for appellee.

Considered by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

**MAHAN, J.**

Marzetti Frozen Pasta, Inc., appeals from the district court's ruling on its petition for judicial review affirming the decision of the Employment Appeal Board, which concluded that the termination of its employee, Oscar Bermudez, was not for misconduct, and remanding to the Iowa Workforce Development Claims Division to address the issue of alien disqualification under Iowa Code section 96.5(10). Marzetti contends the district court erred in affirming the Board because (1) Bermudez is disqualified for benefits due to his misconduct; (2) Bermudez is disqualified for benefits as an alien; and (3) the claims division has already determined that Bermudez is not available for work and therefore remand is unnecessary. The only issue properly before this court is whether Bermudez was disqualified for misconduct. Because we conclude the lapse of one's employment authorization card under the circumstances presented here cannot be deemed misconduct, we affirm.

**I. Background Facts and Proceedings.**

Oscar Bermudez is an alien from El Salvador who began working for Marzetti Frozen Pasta, Inc., in December 2004 full-time by virtue of an I-766 employment authorization document (EAD) issued by the Department of Homeland Security, Immigration and Naturalization Service. The EAD must be renewed annually. As in the past, in 2006 Marzetti reminded Bermudez that he should apply for reauthorization.<sup>1</sup> Bermudez was aware the reauthorization

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<sup>1</sup> The record is unclear when exactly this reminder occurred, but perhaps in August 2006. The website for United States Citizenship and Immigration Services ([www.USCIS.gov](http://www.USCIS.gov)) indicates: "Renewal EAD: You cannot file for a renewal EAD more than 120 days before your original EAD expires."

process would take some time, but did not file his application until August 28, 2006, because he did not earlier have the money for the processing fee.<sup>2</sup> Bermudez continued to work for Marzetti after his authorization card expired on September 9, 2006.

On April 17, 2007, Marzetti discharged Bermudez because he was not able to produce documents that proved he was eligible to be employed.

Bermudez filed for unemployment benefits. Marzetti protested, contending Bermudez was “discharged for misconduct.” Bermudez received notice from Iowa Workforce Development that his request for benefits was denied: “This disqualification was made under law section 96.5-2A.” Bermudez appealed to workforce development appeal division.

After a hearing, the administrative law judge ruled that Bermudez’s failure to have a work authorization card was the sole reason for his separation from Marzetti. The administrative law judge concluded that while Marzetti

perhaps should have filed sooner, the administrative law judge is not convinced he would have had an authorization as of the date of discharge. It was his testimony that it usually takes five months to process a renewal application. Therefore, Mr. Bermudez had reason to expect a new authorization by the end of January of 2007. As of the date of the hearing [May 7, 2007], he still has not received his new work authorization.

The administrative law judge is satisfied Mr. Bermudez made a good-faith attempt to obtain a new work authorization. The delay does not appear to be on his part. He should not be held accountable for delays caused by government procedures. The term “misconduct” connotes volition. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979). The administrative law judge cannot conclude that Mr. Bermudez deliberately and intentionally failed to obtain the work authorization necessary to work for Marzetti.

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<sup>2</sup> Currently \$340.

The administrative law judge noted that Marzetti was required to discharge Bermudez or face legal consequences because it could not legally employ a noncitizen who was not authorized to work. The administrative law judge further noted, however, that circumstances that might warrant a discharge from employment do not necessarily require disqualification from benefits. The administrative law judge remanded to workforce development claims division to determine Bermudez's availability for work.

Marzetti appealed to the employment appeal board, which issued a decision adopting and affirming the "administrative law judge's Findings of Fact and Reasoning and Conclusions of Law." Marzetti asked for a rehearing before the appeal board, which was denied.

Marzetti filed a petition for judicial review before the district court. The district court rejected Marzetti's argument that Bermudez is disqualified from receiving unemployment insurance benefits due to his misconduct. The district court noted that while "it may have been careless for Bermudez to wait to file his renewal, an allegation of misconduct based on carelessness must actually indicate a 'wrongful intent' to be disqualifying." The court concluded the administrative law judge's decision was not wholly irrational, unreasonable, arbitrary, or capricious; was not based upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law; and was supported by substantial evidence.

The district court ruled that the employer's contention that Bermudez was disqualified because of his alien status under Iowa Code section 96.5(10) had not been raised before. The court wrote, "While Bermudez's alien status is

implicated under [96.5(2)(a) and 96.5(10)], he must have notice of the basis for his disqualification in order for his due process rights to be protected and to be able to properly defend.”

Finally, the district court rejected Marzetti’s invitation to find that Bermudez was unavailable for work. The court stated that the administrative law judge had remanded that issue to the claims division and the outcome of the remand was not in the record. The court concluded remand was appropriate because, “[t]he issue of ‘eligibility’ is a week-to-week determination which can change depending on whether an individual is able and available to work at a given point in time.”

Marzetti appeals.

## **II. Scope and Standard of Review.**

The scope of review in cases arising out of the Iowa Administrative Procedures Act is limited to the corrections of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 165 (Iowa 1982). Iowa Code section 17A.19(10)(l) provides in a contested case the court shall grant relief from an agency decision that is based upon an “irrational, illogical, or wholly unjustifiable interpretation of a provision of law whose interpretation is clearly vested by a provision of law in the discretion of the agency.” Section 17A.19(10)(m) requires that the court grant relief if the agency’s decision is based upon an “irrational, illogical, or wholly unjustifiable application of law to fact.” The district court itself acts in an appellate capacity to correct errors of law on the part of the agency. *Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85, 90 (Iowa 1997). A district court decision rendered in an appellate capacity is reviewed to determine whether the district court correctly applied the law. *Id.* If our

conclusions are the same, we must affirm. *Hanson v. Reichelt*, 452 N.W.2d 164, 166 (Iowa 1990).

### **III. Merits.**

Marzetti claims that awarding Bermudez benefits contradicts state law and federal law. However, the only issue properly before us is whether Bermudez was disqualified for misconduct under Iowa Code section 96.5(2)(a) (2007), the section for which Bermudez received notice he was disqualified.

The purpose of Iowa's unemployment compensation law is to protect from financial hardship workers who become unemployed through no fault of their own. *Bridgestone/Firestone*, 570 N.W.2d at 96. "We construe the provisions of that law liberally to carry out its humane and beneficial purpose. Conversely, we are to interpret strictly the law's disqualification provisions, again with a view to further the purpose of the law." *Id.* (citations omitted).

An individual is disqualified from receiving unemployment benefits if the department finds the individual has been discharged for misconduct in connection with the individual's employment. Marzetti asks us to conclude, as a matter of law, that Bermudez's failure to have his employment authorization document (EAD) timely renewed constitutes misconduct under Iowa Code section 96.5(2). We decline.

An employee may be denied unemployment insurance benefits if the employee was discharged for misconduct in connection with his or her employment. See Iowa Code § 96.5(2). The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. See *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989).

Misconduct is defined in the Iowa Administrative Code 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.

Iowa Admin. Code r. 871-24.32(1)(a) (emphasis added).

Marzetti claims Bermudez knew his EAD was going to expire on September 9, 2006, and that it would take “a long time to renew.” The employer argues Bermudez intentionally did not take action at such time that his EAD would be renewed prior to the expiration date, putting the employer in the situation that it could not legally employ him. Marzetti contends this constitutes intentional disregard of the employer’s interests and likens the circumstances to those in *Cook v. Iowa Dept. of Job Service*, 299 N.W.2d 698 (Iowa 1980).

In *Cook*, our supreme court concluded, as a matter of law, that Cook was appropriately denied benefits for misconduct. The court noted that Cook was a truck driver, but his repeated traffic violations rendered him uninsurable and thus unemployable.

While he received most of his driving citations during non-work hours and in his personal car, they all bore directly on his ability to work for Hawkeye. Cook knew this, and even expressed fear to Hawkeye about losing his license. He does not claim that anyone

forced him to violate the laws of the road, yet he persisted in doing so. The district court correctly construed the law in classifying this case as a separation for misconduct . . . .

*Cook*, 299 N.W.2d at 702.

*Cook* is not on point. The appeal board here found no intentional disregard for the employer's interests. Bermudez did file to renew his EAD. Unlike *Cook*—who could control his driving—Bermudez has no control over when and if his EAD will be renewed. In fact, at the time of hearing—some nine months after his EAD had expired—Bermudez had yet to receive authorization. Marzetti has not shown that Bermudez could have filed in a “timely” manner to ensure renewal. (We note that the United State Citizens and Immigration Services website inform aliens that one cannot file for a renewal “more than 120 days before your original EAD expires.”) Under these circumstances, we cannot find misconduct as a matter of law.

Marzetti asks us to find that Bermudez is disqualified as an “alien” under Iowa Code section 96.5(10) and that Bermudez is not available to work as a matter of law. We would first state that those matters are not as simple as they might seem. See 72 Fed. Reg. 161, 46649-46653 (Aug. 21, 2007) (discussing extension of temporary protected status for El Salvadorans). Moreover, contrary to Marzetti's insistence, we have no authority to make findings of fact and declare the parties' rights. See *Bridgestone/Firestone*, 570 N.W.2d at 97. Marzetti is adequately protected and has sufficient methods through which to make its case before the agency—with proper notice to the employee—for alien disqualification and unavailability for work.



**IV. Conclusion.** The district court properly concluded that Bermudez was not discharged for misconduct under section 96.5(2). Whether Bermudez is subject to alien disqualification under section 96.5(10) has not been determined by the agency, nor has Bermudez's availability for work. The issues are properly remanded to the agency. We affirm.

**AFFIRMED.**