

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JEFFREY M GLIEM
Claimant

APPEAL NO. 11A-UI-09157-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FARMLAND FOODS INC
Employer

OC: 06/12/11
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Jeffrey Gliem filed a timely appeal from the July 7, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 3, 2011. Mr. Gliem participated personally and was represented by attorney Dennis McElwain. The employer submitted written notice on August 1, 2011 that it would not be participating in the hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jeffrey Gliem was employed by Farmland Foods, Inc., from 1988 until June 15, 2011, when the employer discharged him from the employment. Mr. Gliem was a full-time maintenance mechanic during the final decade of his employment. The incident that triggered the discharge occurred on June 15, 2011. On that day, Mr. Gliem was observing a bagger machine on the cut floor while the cut floor workers were on break. Mr. Gliem was up a ladder in a confined space. The electrical power was connected to the machine and the machine was running. The lid to the machine was raised. While Mr. Gliem was up on the ladder to observe the machine run, Mr. Gliem placed his left hand on the machine to steady himself. Mr. Gliem slipped and suffered a cut to a finger on his left hand. Mr. Gliem had worked on the same machine earlier in the shift and had earlier believed the machine was fixed. At the time Mr. Gliem injured his hand, he concluded it was necessary to have power to the machine and to have it operating while he went about troubleshooting the problem with the machine.

The employer suspended Mr. Gliem on June 7, 2011 based on what the employer deemed a lock-out tag-out violation. Ordinarily the employer would create lock-out tag-out rules specific to each machine. The employer had not written lock-out tag-out rules for the machine that Mr. Gliem was observing on June 7, the machine on which he was injured. In the absence of such rules, Mr. Gliem had exercised his judgment regarding the steps necessary to safely observe the machine.

After the employer suspended Mr. Gliem on June 7, the employer summoned Mr. Gliem to a meeting on June 15 and discharged him from the employment.

REASONING AND CONCLUSIONS OF LAW:

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer waived participation in the hearing. The employer failed to present any evidence to support the allegation that Mr. Gliem was discharged for misconduct in connection with the employment. The evidence in the record establishes that in the absence of a clear lock-out tag-out directive from the employer, Mr. Gliem exercised his own judgment about how to go about performing his duties, made an error in judgment, and suffered injury as a result. The evidence fails to establish carelessness, negligence, or intentional disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Gliem was discharged for no disqualifying reason. Accordingly, Mr. Gliem is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Gliem.

DECISION:

The Agency representative's July 7, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs