

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANNY D PURK
Claimant

APPEAL NO. 12A-UI-03685-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 02/19/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated March 30, 2012, reference 01, which held that the claimant was eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 25, 2012. The claimant participated. The employer participated by Aureliano Diaz, human resources manager. The record consists of the testimony of Aureliano Diaz; the testimony of Danny Purk; Claimant's Exhibits A through F; and Employer's Exhibits 1 through 6.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a pork processing plant located in Marshalltown, Iowa. The claimant was hired on September 13, 1989. His last day of work was February 17, 2012. He was terminated on February 17, 2012. At the time of his termination, he was the third shift rendering supervisor.

No specific incident led to the claimant's termination. The claimant was terminated for performance issues, which included management of employees; attitude; performance; accountability; and autonomy. On November 11, 2011, a meeting was held with the claimant concerning the employer's expectations in a supervisory role. The claimant was told that he needed "serious improvement." (Exhibit F)

On February 17, 2012, the claimant was called to Mike McQuade's office. Mr. McQuade is the director of human resources. Mr. McQuade informed the claimant that he had shown improvement, but he was being terminated anyway. The claimant was then given a bonus check, which is designed to reward good performance.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

Misconduct that leads to disqualification from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The legal definition of misconduct excludes unsatisfactory job performance. Failure in job performance due to inability or incapacity is not considered misconduct because the actions were not volitional. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979). Where an individual is discharged due to a failure in job performance, proof of that individual's ability to do the job is required to justify disqualification, rather than accepting the employer's subjective view. To do so is to impermissibly shift the burden of proof to the claimant. Kelly v. IDJS, 386 N.W.2d 552 (Iowa App. 1986).

The claimant was unable to perform his duties to the satisfaction of the employer. The claimant had been warned that his performance needed to improve. When he was terminated, he was actually told that his performance had improved but he was still being terminated. There is no evidence of misconduct in this record. The employer may have had good business reasons for terminating the claimant, but there was no showing that the claimant intended to do his job poorly. No incident or incidents were identified that would show intentional misconduct. Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988). Accordingly, no disqualification pursuant to Iowa Code § 96.5(2)a is imposed. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 30, 2012, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw