

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRODNEY BARRY
Claimant

APPEAL NO: 14A-UI-01918-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

**OC: 01/05/14
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 10, 2014, reference 03, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 7, 2014. The claimant participated in the hearing. Aureliano Diaz, Human Resources Director and Leslie Buhler, Employer Representative, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time maintenance mechanic for Swift Pork Company from May 20, 2013 to December 6, 2013. He was discharged for insubordination after being warned.

On November 19, 2013, the claimant became upset with co-worker Richard Dolan because they were grinding shackles and Mr. Dolan refused to turn a different direction so the metal shavings did not hit the claimant in the face. The claimant asked Mr. Dolan to go another direction but he replied he was told to “do this” by Supervisor Ed Smith. Mr. Smith told the claimant to work on the shackles three times after he stopped because of Mr. Dolan’s actions and the claimant refused because it was an unsafe work environment for him. The claimant told Mr. Smith he could not work with “this lunatic” because the metal fragments from Mr. Dolan were hitting him in the face and Mr. Smith said if the claimant did not want to work they would go to human resources. The claimant was quite agitated and agreed they should proceed to human resources. While waiting in the human resources lobby area the claimant made a phone call and was loud and using profanity on the call. He referred to Mr. Dolan as a “fucking retard” and a “psycho.” Human Resources Supervisor Aureliano Diaz told him to watch his language and wait in the office and the claimant ended his call. Mr. Diaz, Mr. Smith and the claimant met in the office and the claimant complained about Mr. Dolan but did not mention the metal shavings hitting him in the face. He did ask Mr. Smith why he did not mention the metal fragments. The claimant had his say and Mr. Smith started trying to explain that while the claimant and

Mr. Dolan did not have to like each other they needed to work together to get the job done. The claimant repeatedly interrupted Mr. Smith even though Mr. Diaz told him several times to let Mr. Smith have his turn. Mr. Smith told the claimant to be quiet and listen three times but the claimant would not listen, displayed a poor attitude, and was argumentative. Consequently, the employer suspended him November 19, 2013, until it decided how to proceed with disciplinary action. The employer consulted the human resources director, located in the plant, and the legal department, located in Greeley, Colorado, before notifying the claimant in a certified letter, mailed December 6, 2013, that his employment was terminated. The claimant did not receive the letter until December 12, 2013.

The claimant received a written warning August 9, 2013, after an altercation with a cleaning person. He was told his behavior violated the employer's policy and any further incidents could result in further disciplinary action up to and including termination.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The claimant had a very legitimate concern about Mr. Dolan's actions which resulted in metal shavings striking him in the face when he removed his welding helmet and safety glasses to inspect his work. Rather than address the issue Mr. Smith repeatedly told him to return to work. The claimant understandably refused to do so as he had a valid safety concern. While the claimant could have responded more appropriately and less excitedly, his actions to that point were not unreasonable. After leaving the plant floor and going to the human resources area, though, he failed to calm down and participate in a reasonable conversation with Mr. Smith and Mr. Diaz. He made a phone call from the lobby that was loud and profanity-laced. When he entered the human resources office, he had the opportunity to at least explain the problem with Mr. Dolan to Mr. Diaz and obtain a satisfactory resolution to the situation. Instead, after the claimant was allowed to state his side, during which time he did not bring up the metal shavings, he refused to listen to Mr. Smith or allow him to talk without interruption. At that point, the claimant's behavior, not that of Mr. Dolan, became the focus of the meeting. Mr. Diaz asked the claimant on several occasions to stop interrupting Mr. Smith and being argumentative but the claimant continued until he was suspended. The claimant's behavior in the human resources offices was inappropriate and unprofessional. That said, however, the claimant felt he was being forced to work in an unsafe environment and did not handle the situation appropriately. He was excited and agitated and let his emotions get the better of him. While not condoning the claimant's actions, the administrative law judge must conclude this was an isolated incident of poor judgment on the part of the claimant and does not rise to the level of disqualifying job misconduct. Additionally, the administrative law judge does not find the claimant's actions to be a current act of misconduct. Mr. Diaz has the authority to discharge an employee without consulting other human resources or legal department employees. Given his immediate involvement in the incident, it is understandable that he might want to think about the situation overnight, or even for two or three days, and not make a decision in the heat of the moment. It was not reasonable to wait 17 days before sending the claimant the certified letter, a letter the claimant did not receive until the 23rd day of his suspension, notifying him that his employment was terminated. Under these circumstances, the administrative law judge concludes the claimant's conduct does not constitute disqualifying job misconduct and, in the alternative, if it was disqualifying, is not a current act of misconduct, as those terms are defined by Iowa law.

DECISION:

The February 10, 2014, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/css