

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOEL G TOLENTINO
Claimant

APPEAL NO. 16A-UI-04869-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAMOND CRYSTAL BRANDS INC
Employer

OC: 04/03/16
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Joel Tolentino filed a timely appeal from the April 21, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Tolentino had been discharged on April 6, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on May 11, 2016. Mr. Tolentino participated. Diana Perry-Lehr represented the employer and presented testimony through Tiffany Phillips and Corey Baker. Department Exhibits D-1 through D-6 were received into evidence.

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: Joel Tolentino was employed by Diamond Crystal Brands, Inc. as a full-time machine operator from 1992 until April 6, 2016, when Tiffany Phillips, Human Resources Manager, and Corey Baker, Production Manager, discharged him from the employment in response to a second lock-out/tag-out violation. Mr. Tolentino received properly training in the lock-out/tag-out procedure. The employer's work rules called for a three-day suspension for a first lock-out/tag-out violation and termination in the event there was a second violation. On July 13, 2015, Mr. Tolentino failed to follow the lock-out/tag-out protocol before he adjusted a tape inside a tape machine. On July 15, 2015, the employer issued a written reprimand and suspended Mr. Tolentino for three days. In the reprimand, the employer warned Mr. Tolentino that another lock-out/tag-out violation would result in termination of the employment. After the July 2015 violation, the employer had Mr. Tolentino undergo re-training on the lock-out/tag-out procedure. On April 5, 2016, Mr. Tolentino again adjusted the tape inside the tape machine without following the lock-out/tag-out procedure. Mr. Tolentino attributes the lock-out/tag-out violation to working late hours. Mr. Tolentino's regular hours were 4:00 a.m. to 2:30 p.m., Monday through Thursday. The employer sometimes had Mr. Tolentino work 12-hour shifts, Monday through Friday.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

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 evidence in the record establishes that on April 5, 2016 Mr. Tolentino committed the exact same lock-out/tag-out violation that he had committed on July 13, 2015. Mr. Tolentino knew the lock-out/tag-out procedure was in place to prevent from being seriously injured. Mr. Tolentino knew he was required to follow the lock-out/tag-out procedure before he made an adjustment inside the machine. In connection with the first lock-out/tag-out violation, the employer specifically warned Mr. Tolentino that if it happened again he would be discharged from the employment. Despite that warning and despite being fully aware of the consequences to his employment, Mr. Tolentino elected to violate the lock-out/tag-out procedure on April 6, 2016. Mr. Tolentino's conduct on April 6, 2016 was in wanton and willful disregard of the employer's interest in maintaining a safe work environment and preventing injury. Mr. Tolentino's long work hours in no manner mitigated the seriousness of his repeat violation of a critically important safety rule.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Tolentino was discharged for misconduct. Accordingly, Mr. Tolentino is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The April 21, 2016, reference 01, decision is affirmed. The claimant was discharged on April 6, 2016, for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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