

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KRISTINA WINTHER
Claimant

APPEAL NO. 09A-UI-16374-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BEEF PRODUCTS INC
Employer

**Original Claim: 09/27/09
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 20, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on December 7, 2009. Claimant Kristina Winther participated. Rick Wood, Human Resources Manager, represented the employer and presented additional testimony through Kelly Miller, Raw Materials Supervisor. Exhibits A, One through Six, and Eight through Fifteen 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: Kristina Winther was employed by Beef Products, Inc., (BPI) as a full-time production laborer from November 2007 until September 28, 2009, when Rick Wood, Human Resources Manager, discharged her for careless performance of her work duties. The employer mixes meat product in large quantity for various customers.

The final incident that prompted the discharge occurred on September 24, 2009. During that shift, Ms. Winther was the person responsible for checking the raw meat product about to be dumped into the meat mixture to assure that the proper raw product was being introduced into the mixture. Toward the end of the shift, Ms. Winther missed a step in the product verification procedure and the wrong raw meat materials were introduced into the mixture. Another employee caught the error and reported it to a supervisor. The mixture had to be downgraded in quality due to the mixing error. Ms. Winther had made a similar error on May 28, 2009.

In making the decision to discharge Ms. Winther from the employment, the employer also considered a September 4, 2009 violation of the lock-out/tag-out protocol. On that date, Ms. Winther had cleaned accumulated fat off a mechanical part while the production line was stopped but the equipment in question had not been rendered inoperable through the

lock-out/tag-out process. Ms. Winther had received proper training in the lock-out/tag-out procedure and neglected to follow the protocol on that occasion. Ms. Winther's failure to follow the lock-out/tag-out protocol prompted her demotion from lead person to the tape and record duties she was performing at the time of the final incident that triggered the discharge.

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 weight of the evidence establishes that Ms. Winther was careless and/or negligent on May 28 and September 24, 2009, when she missed a step in the tape and record process and caused an error in mixing meat product. The evidence indicates that Ms. Winther was negligent on September 4 when she failed to follow the lock-out/tag-out procedure. The administrative law judge notes that Ms. Winther took responsibility for the incidents when they occurred and otherwise performed her duties in a satisfactory manner. The lock-out/tag-out violation was an isolated incident. The mixing errors occurred four months apart. Though the evidence establishes three incidents involving carelessness and/or negligence, the conduct was not so recurrent as to indicate a wanton or willful violation of the employer's interest. Accordingly, the conduct did not rise to the level of misconduct that would disqualify Ms. Winther for unemployment insurance benefits.

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

DECISION:

The Agency representative's October 20, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw