IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ANSU O KAMARA
Claimant

SWIFT & COMPANY
Employer

APPEAL NO. 09A-UI-16828-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/06/09
Claimant: Respondent (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated October 26, 2009, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on December 15, 2009. Claimant participated. Employer participated by Tony Luse, employment manager. The record consists of the testimony of Tony Luse; the testimony of Ansu Kamara; and Employer's Exhibits 1-9.

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 producer and operates a plant in Marshalltown, Iowa. The claimant was hired on December 29, 2008, as a full time production worker. At the time he was hired he was given three days orientation and provided with an employee handbook. The claimant was also required to take and pass a safety test. The employee handbook provided that if an employee received four disciplinary notices/warnings, termination would result. The claimant received his fourth disciplinary write-up on September 4, 2009, and was terminated.

The final event that led to the claimant's termination on September 4, 2009, was his failure to return to his job in a timely manner after receiving ice treatment in health services. The claimant was in health services from 5:30 and 5:50 p.m. He did not return to his job until 6:10 p.m. This was considered by the employer to be misuse of company time. The claimant was also chewing gum, which was a food safety violation. He had been on a final written warning after leaving the line without notifying his supervisor on July 27, 2009. He was informed that this was his final written warning and that any recurrence would result in discharge.

The claimant received a disciplinary notice on June 24, 2009, for failing to wear his personal protection equipment. He was given a written warning on May 20, 2009, for spearing meat. He used his knife to jab at the meat, which is considered by the employer to be dangerous to the employee and co-workers.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

After carefully reviewing all of the evidence in the record, the administrative law judge concludes that there is insufficient evidence in the record to establish misconduct. The claimant denied that the incidents described in the last two disciplinary notices occurred. He testified that he was doing re-work during the time he was accused of not working. He also denied that he had walked off the line on July 27, 2009. He claimed he had permission from his manager to leave and go to Health Services. The administrative law judge has some reservations about the reliability of the claimant's testimony. It is the employer's burden, however, to show misconduct. The employer's evidence is set forth in the written disciplinary notices and there was no direct

testimony from the individuals who actually issued the warnings or had first hand knowledge on what occurred.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code section 17A.14(1)..Allegations of misconduct 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 Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W. 2d 603, 607-608 (Iowa App. 1990), the Court requires evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test, requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. at 608

The employer's evidence is essentially hearsay. The administrative law judge is mindful that these are the types of records that employers do rely on in conducting their businesses and that the claimant had union representation as evidenced by signatures from union representatives. However, given the denial and explanations from the claimant, those records are insufficient in and of themselves to establish misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:
The decision of the representative dated October 26, 2009, reference 03, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs