IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WILLIAM R GALARZA Claimant **MARZETTI FROZEN PASTA INC** Employer	**APPEAL 17A-UI-05865-NM** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/07/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the June 5, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for violation of a known company rule. The parties were properly notified of the hearing. A hearing was held on June 28, 2017 in Des Moines, Iowa. The claimant appeared in person and testified with the assistance of Spanish language interpreter Rafael Geronimo. The employer participated via telephone through Human Resource Manager Joan Tapps, Operations Manager Tim Berryfield, and Production Manager Beth Gravett. Employer's Exhibits 1 and 2 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production tech 2 from January 25, 2009, until this employment ended on May 8, 2017, when he was discharged.

On April 19, 2017, a metal scoop was found in a mix on the production line where claimant was working. Berryhill initiated an investigation to determine how the scoop got in the mix. As part of the investigation Berryhill examined the shadow board inventory check-off for the date in question. (Exhibit 2). The sheet showed the A shift employee, Ko, had initialed that all tools were accounted for at 5:30. There is also a signature on the supervisor line. The sheet also contains a notation, written by claimant, that he noticed a scoop missing at 7:35, approximately five minutes after his shift started.

Berryhill initially believed the scoop had gone missing sometime during the A shift and interviewed those production employees, leads, and manager on April 20. (Exhibit 1). When presented with the check-off, both Ko and the supervisor who signed the sheet, denied that was the sheet they filled out for their shift. The employer examined the same employees' initials and signatures on other sheets and concluded they did not match. The sheet is kept on a clipboard

that all employees have access to. Berryhill then began to focus his investigation on B shift employees. Berryhill interviewed these employees, including claimant and one other employee who was working with claimant on his mixes, on April 20. Claimant denied he forged anyone's initials or signatures. Claimant testified the sheet in question is the one he was presented with when his shift began and again denied signing anyone else's initials or name.

Berryhill ultimately concluded, on April 28, that claimant must have forged the A shift employee's initials, as well as the supervisor's signature. This conclusion was based on the fact that the A shift employees denied they filled out the check-off sheet found in the employer's record, claimant was the individual on B shift responsible for the check-off sheet, and the scoop was found in mix he was working on. Berryhill testified he was not able to conclude his investigation before April 28 due to the extensive information he had to review. He testified this information consisted of the three pages of documents found in Exhibit 2, as well as three to four pages of mix sheets. Once Berryhill's investigation was concluded a summary sheet had to be sent to the corporate office for review, prior to a final decision on discipline being made. This decision was made on May 8, the date claimant was discharged. Claimant was not given any reason to believe he was being investigated until May 3, 2017, when he was told to go home and wait for a call. Claimant was not advised that the employer was considering terminating his employment.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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 Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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.

A lapse of 11 days from the final act until discharge when claimant was notified on the fourth day that his conduct was grounds for dismissal did not make the final act a "past act." Where an employer gives seven days' notice to the employee that it will consider discharging him, the date of that notice is used to measure whether the act complained of is current. *Greene v. Emp't Appeal Bd.*, 426 N.W.2d 659 (Iowa Ct. App. 1988). An unpublished decision held informally that two calendar weeks or up to ten work days from the final incident to the discharge may be considered a current act. *Milligan v. Emp't Appeal Bd.*, No. 10-2098 (Iowa Ct. App. filed June 15, 2011).

The employer knew about the issue on April 19, 2017. The employer conducted a thorough investigation on April 20, which included reviewing pertinent documents and interviewing employees. Berryhill testified the investigation took another eight days to conclude because of the amount of information he had to review. However, this information appears to consist of between six and seven pages of documents. It is not clear why it was necessary to take eight days to review this information. Claimant was completely unaware he was the focus of any investigation until May 3 when he was sent home and even then he was not told he was the subject of an investigation that may result in disciplinary action. Once the investigation was concluded, it was sent to the corporate office and no decision was made until May 8, when claimant was discharged. The delay of 19 days indicates the employer has not established a current or final act of misconduct. Benefits are allowed on this basis. Furthermore, given the lack of credible evidence, the employer failed to establish misconduct even were it current.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

Here, the employer concluded claimant had forged the check-off sheet because the A shift employees denied they filled out the check-off sheet found in the employer's record, claimant was the individual on B shift responsible for the check-off sheet, and the scoop was found a mix he was working on. Upon reviewing the document in question, as well as other documents with the same initials and signatures, it is clear that the supervisor signature does not match those on other documents. It is not clear, however, that the initials and numbers in question are conclusively different than those written by the same individual on other sheets. It also does not appear that either of these necessarily matches claimant's writing. It is further unclear what motivation claimant would have to forge such documents, as he is the individual who first noticed the missing tool. Finally, it is worth noting that, by the employer's own admission, anyone had access to these sheets, meaning anyone could have replaced the sheet without claimant or other employees knowing.

Claimant provided credible testimony that the sheet in question is the sheet he was presented with when he started work on April 19 and that he did not sign anyone else's name or initials. The employer has not met its burden in showing that it was claimant who forged the initials or the signature on the check-off sheet. As the employer has not met its burden in showing claimant engaged in any disqualifying misconduct, benefits are allowed.

DECISION:

The June 5, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill
Administrative Law Judge

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Decision Dated and Mailed

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