

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BERNARD PENELTON

Claimant

APPEAL NO. 12A-UI-04065-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC

Employer

OC: 07/03/11

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Bernard Penelton filed a timely appeal from the April 5, 2012, reference 05, decision that denied benefits. After due notice was issued, a hearing was held on May 3, 2012. Mr. Penelton participated. Alejandra Rojas, Human Resources Specialist, represented the employer. Exhibits One through Five 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: Bernard Penelton was employed by West Liberty Foods as a full-time maintenance mechanics from January 3, 2012 until February 21, 2012, when Monica Dyar, Human Resources Supervisor, discharged him from the employment for failure to properly lock out tag out under the employer's policy and OSHA regulations. On February 21, 2012, Mr. Penelton was working with two more senior maintenance mechanics to remove a machine from the production floor so that it could be taken to the shop for further work. Mr. Penelton went through the lock-out/tag-out steps to cut power to the machine and to lock out power to the machine. The machine was hardwired and as part of process of disconnecting it from the power, Mr. Penelton had to cut the power cord. Mr. Penelton placed wire nuts on the end of the cord to cover the loose wire and pushed the wires inside the conduit. Toward the end of Mr. Penelton's shift, he retrieved his personal locks and tags from the area with the intention of having one of the other maintenance mechanics put other locks and tags on or replacing the locks and tags with overnight locks to keep the machine locked out and tagged out. Mr. Penelton then forgot to follow through so that the machine could remain properly locked out and tagged out until it was time to reconnect the machine.

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 indicates that Mr. Penelton was a new employee and did not fully understand the lock-out/tag-out requirements. The evidence further indicates that Mr. Penelton did not intentionally violate the lock-out/tag-out protocol, though a violation clearly occurred. Mr. Penelton's violation of the policy was caused by his inexperience and by his forgetfulness. The evidence establishes a very serious instance of negligence, but an isolated incident. While it was within the employer's discretion to end the employment based on the incident, in the absence of evidence of further incidents of negligence, there is insufficient evidence in the record to establish misconduct in connection with the employment that would disqualify Mr. Penelton for unemployment insurance purposes. Mr. Penelton is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Penelton.

DECISION:

The Agency representative's April 5, 2012, reference 05, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css