

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRENDA AVINA-PEREZ
Claimant

APPEAL NO. 09A-UI-17855-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

**Original Claim: 11/01/09
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Brenda Avina-Perez filed a timely appeal from the November 24, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 8, 2010. Claimant participated. On December 21, 2009, the employer submitted written notice that it would not be participating in the appeal hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the discharge was based on a current act.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brenda Avina-Perez was employed by Swift & Co./JBS as a full-time Human Resources Coordinator from 2000 until November 4, 2009, when the Director of Human Resources discharged her from the employment. Ms. Avina-Perez's brother also worked for the employer. In August 2009, a human resources supervisor approved the brother's request for unpaid time off and directed Ms. Avina-Perez to prepare the appropriate paperwork and present the same to the brother's supervisor for approval. Ms. Avina-Perez followed the instructions given to her and the brother's supervisor approved the request for time off.

Toward the end of October, the Director of Human Resources summoned Ms. Avina-Perez to a meeting and erroneously alleged that Ms. Avina-Perez had herself approved the request for time off without authority to do so. On November 4, the Director of Human Resources notified Ms. Avina-Perez that she was being discharged from the employment based on the alleged wrongdoing in August.

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 employer waived its right to participate in the hearing and did not present any evidence to support an allegation of misconduct. The evidence in the record indicates that the conduct in question occurred in August 2009 and came to the attention of two supervisors at that time. The employer waited until the end of October to allege that the August incident involved misconduct on Ms. Avina-Perez's part and to notify her that the conduct could result in her discharge from employment. At that point, the conduct no longer constituted a current act and could not serve as the basis for disqualifying Ms. Avina-Perez for unemployment insurance benefits. See 871 IAC 24.32(8). Even if the evidence had established a current act, the evidence fails to establish misconduct. The evidence indicates instead that Ms. Avina-Perez merely followed the supervisor's directive in connection with her brother's request for time off.

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

DECISION:

The Agency representative's November 24, 2009, reference 01, decision is reversed. 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