

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DUSTIN L COWLING**  
Claimant

**APPEAL NO. 13A-UI-08698-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OSCEOLA FOOD LLC**  
Employer

**OC: 06/23/13  
Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated July 18, 2013, reference 02, which denied unemployment insurance benefits. After due notice, a telephone hearing was held on September 3, 2013. Claimant participated. Participating as witnesses for the claimant were Donald Cowling, Claimant's Father; Shelli Cowling, Claimant's Son; and Tony Simmerman, Co-Worker. The employer participated by Mr. Aaron Peterson, Human Resource Manager.

**ISSUE:**

The issue is whether the evidence in the record is sufficient to establish misconduct.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Dustin Cowling was employed by Osceola Food, LLC. from November 15, 1999 until June 27, 2013 when he was discharged based upon the employer's suspicion that Mr. Cowling had been misappropriating scrap metal/electric motors from the employer's facility.

Based upon statements that had been made by another company employee, the claimant was taking scrap metals from the employer's facility without authorization, and a call from a local recycling firm indicated that the claimant had been selling scrap copper and scrap electric motor parts. The employer concluded that Mr. Cowling was engaging in misappropriation of company property in violation of a previous warning that had been given to the claimant for the same offense.

Mr. Cowling denied misappropriating company property and had explained to his employer that although he had sold copper and parts of electric motors to the recycler, he had obtained the scrap metal from other sources as he did recycling to supplement his income. The claimant also denied the other employee's allegations and stated that the trunk in his automobile had been opened for inspection when he left the employer's premises.

Based upon the amount of scrap copper and electric motor components that the recycler stated that Mr. Cowling had sold, the employer concluded that a portion of the metal must have come from the employer's facility and a decision was made to terminate Mr. Cowling from his employment.

**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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

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 upon such past acts. The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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 what 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 Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In this matter, the employer relies primarily on hearsay evidence in support of its position that Mr. Cowling misappropriated company property and sold it for scrap to a local recycling firm. In contrast, the claimant and his witnesses participated personally and provided firsthand, sworn testimony denying the employer's allegations and provided reasonable explanations for the scrap metal that Mr. Cowling sold to the local recycler.

Although hearsay is admissible in administrative proceedings, it cannot be accorded the same weight as sworn, direct testimony, providing that the direct testimony is credible and not inherently improbable. Although the employer had the opportunity to provide firsthand witnesses and their sworn testimony about Mr. Cowling's activities at Osceola Food, L.L.C. and/or at the recycling location, the employer chose not to do so.

The question before the administrative law judge is not whether the employer had a right to discharge Mr. Cowling for these reasons but whether the discharge is disqualifying under the provisions of the Employment Security Law. While the decision to terminate Mr. Cowling may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing disqualifying misconduct in this matter. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated July 18, 2013, reference 02, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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