

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIGUEL ORTIZ

Claimant

APPEAL NO. 11A-UI-02554-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 01/02/11

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated February 22, 2011, reference 02, which held the claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was held on April 13, 2011. Claimant participated personally. The employer participated by Mr. Aureliano Diaz, Acting Human Resource Manager. Official Interpreter was Mr. Ike Rocha. Employer's Exhibits One through Four were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Miguel Ortiz was employed by Swift Pork Company, now doing business as JBS, from August 28, 2006 until January 5, 2011 when he was discharged from employment. Mr. Ortiz worked as a full-time production worker working the second shift and was paid by the hour.

Mr. Ortiz was suspended on December 30, 2010 pending an investigation into what the company believed was the claimant's damage to a motorized pallet jack (mule).

The claimant had been suspended previously when the motorized pallet jack that he was operating had been damaged when pallets had hit the jack. It was determined to suspend Mr. Ortiz for a number of days and then allow him to return and issue the claimant a final warning. The claimant returned to work on December 29, 2010 and was once again suspended and subsequently terminated based upon the employer's belief that additional damage had been caused to the pallet jack by Mr. Ortiz after his return from the previous suspension.

An A-shift employee had reported damage to the pallet jack that Mr. Ortiz had most recently operated on the previous shift. The employer therefore believed that the claimant had once again engaged in damaging company equipment. The portion of the damage to the palletized

jack that the employer believed had most recently been caused by Mr. Ortiz, had been caused in the initial incident which had caused the claimant's previous suspension from work. Mr. Ortiz denies any further damage to the pallet jack and verified that the portion of the jack that the employer noted had been damaged, was the portion of the jack that had previously been damaged in the prior incident.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record is sufficient to warrant the denial of unemployment insurance benefits. It is not.

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. 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 a current act of misconduct a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a disqualification. If the employer is unable to furnish evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

The evidence in the record shows that Mr. Ortiz had previously been disciplined and suspended because of an incident in which the motorized pallet jack that he was assigned to had been damaged. Upon the claimant's return to work after his suspension the employer believed that the pallet jack had been further damaged. The evidence in the record reflects that the damage on the pallet jack was the damage that had previously occurred and that the claimant did not engage in any damaging of company property at the time of his termination from employment.

The administrative law judge finds the claimant to be credible witness and finds this his testimony is not inherently improbable. The evidence establishes that the claimant had previously been suspended and had been allowed to return to work. The evidence in the record does not establish additional intentional misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. Benefits are allowed providing the claimant meets all other eligibility requirements of Iowa law.

DECISION:

The representative's decision dated February 22, 2011, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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