

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BILL G HART
Claimant

APPEAL NO. 12A-UI-12593-W

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARZETTI FROZEN PASTA INC
Employer

OC: 7/1/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a fact-finding decision dated October 12, 2012, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on December 18, 2012 in Des Moines, Iowa. Claimant participated through legal counsel, Benjamin Humphrey. Employer participated by Jody L. Chance, Hearing Representative for Thomas & Thorngren, as well as H.R. Manager, Steve Bowers. Pedro Enamorado, Production Supervisor, participated as a witness. Employer Exhibits A through E were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds:

Claimant worked for employer beginning in May 2004. He was a full-time production worker. He was discharged on September 26, 2012 by employer for the violation of lock-out/tag-out safety procedures.

On September 25, 2012, Production Supervisor, Pedro Enamorado observed the claimant cleaning the double arm mixer. The mixer was locked out properly. The auger was not. Due to the claimant's past work history and a final warning he received in August 2012 for verbal abuse, he was terminated immediately on September 26, 2012.

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.

871 IAC 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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

For the following reasons, the administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is qualified for the receipt of unemployment insurance benefits.

The employer argued that the claimant violated an important company safety standard when he failed to follow proper lock-out/tag-out procedures on the double arm mixer. The claimant properly locked out the mixer, but not the auger. The claimant testified that he performed the lockout procedure as he always had since he was trained in 2004. He claimed he never knew that both boxes, which were located next to one another, needed to be locked out in order for the process to be safe.

In order for this error to amount to “misconduct” as defined by Iowa law, the employer must prove either (a) that the claimant deliberately disregarded the proper safety procedures, or (b) that he was careless to such a degree of recurrence as to demonstrate a substantial disregard of his duties to the employer.

The employer did not prove that the claimant deliberately violated the safety standard. In this regard, the claimant’s credibility is fundamental to the case. The claimant is found credible and believable based upon his demeanor at hearing, in addition to the substance of his testimony. He testified that he simply followed the procedure the way he had been trained from the beginning of his employment. The employer really offered no contrary testimony. Admittedly, it would be quite difficult for the employer to document how each individual employee was trained on each individual machine. The employer did provide proof that the claimant was trained on proper safety protocol, including lock-out/tag-out, however, the evidence was not convincing that the claimant was ever trained regarding the specific details of the double arm mixer. This machine was undeniably unusual in that it had a mixer and an auger. The employer conceded that at some point during the claimant’s tenure, the safety procedure for this machine was changed. The claimant testified credibly that he was unaware of the change. He had no motive to lie about this or not follow the new procedure as it was a safety procedure designed to keep employees such as him safe from injury. As such, the violation of the protocol was simply not volitional. At worst, it was a good faith mistake.

The claimant, however, had been provided a final warning in August 2012. Specifically, he had been warned for verbally abusing another employee on August 14, 2012. In that final warning, the employer cautioned that “any further violations of this *or any type* will result in termination of your employment.” This final warning was a continuation of the employer’s progressive discipline policy and resulted in a five-day suspension. The claimant had committed a similar verbal abuse infraction in November 2011. The employer, however, did not prove that the claimant committed recurring acts of negligence related to safety as to amount to misconduct. The employer certainly had a right to place the claimant on a final warning for his acts of verbal abuse toward a co-worker in August 2012. The final act, however, must amount to misconduct under Iowa law in order to disqualify the claimant from the receipt of unemployment benefits. In this case, the claimant’s final act was an isolated mistake rather than any pattern of negligence or deliberate violation of a company rule. As such, the claimant is not disqualified from the receipt of unemployment benefits.

DECISION:

The fact-finding decision dated October 12, 2012, reference 01, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Joseph L. Walsh
Administrative Law Judge

Decision Dated and Mailed

jlw/tll