

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

NIYOGUSHIMA JOZIAZ

Claimant

APPEAL NO. 19A-UI-03117-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COOMPANY

Employer

OC: 03/17/19

Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) - Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 4, 2019, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible for benefits and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on March 15, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on May 3, 2019. Claimant Niyogushima Joziaz did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Vicki Cervantes represented the employer and presented additional testimony through Chelle Kriegel. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Niyogushima Joziaz was employed by Swift Pork Company, doing business as JBS, as a full-time janitor from 2017 until March 19, 2019, when the employer discharged him from the employment for sleeping on the job. Mr. Joziaz's work hours were 3:30 p.m. to midnight, Monday through Friday. Mr. Joziaz was also required to work on Saturdays as needed. At 11:45 p.m. on March 15, 2019, a supervisor discovered Mr. Joziaz asleep on a bench in an

employee locker room. Mr. Joziaz was not on a break. The employer took photos of Mr. Joziaz while he was sleeping. The photos indicate that Mr. Joziaz intentionally laid down and went to sleep on the bench. The employer estimates that Mr. Joziaz was asleep for 30 minutes. The employer's written work rules prohibited employees from sleeping while clocked in and subjected employees to discharge from the employment upon first violation of the policy. On that day, Mr. Joziaz had not reported any illness to the employer or to the employer's onsite health services staff. Had Mr. Joziaz reported an illness to the health services staff and a need to rest, the health services staff had cots available for that purpose.

Mr. Joziaz established an original claim for benefits that was effective March 17, 2019 and received \$3,560.00 in benefits for the period of March 17, 2019 and May 11, 2019. The employer is the sole base period employer.

On April 2, 2019, an Iowa Workforce Development deputy held a fact-finding interview that addressed Mr. Joziaz's separation from the employer. Vicki Cervantes, Human Resources Manager, represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The evidence in the record establishes a discharge based on misconduct in connection with the employment. The weight of the evidence establishes that the claimant intentionally took a nap in the employee locker room on March 15, 2019 he was being paid to perform work for the employer. The weight of the evidence establishes a non-illness based intentional violation of the employer's zero tolerance policy. The sleeping episode demonstrated an intentional and substantial disregard for the interests of the employer. Mr. Joziaz is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Joziaz must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Joziaz received \$3,560.00 in benefits for the period of March 17, 2019 and May 11, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Joziaz received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Joziaz is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The April 4, 2019, reference 01, decision is reversed. The claimant was discharged on March 19, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$3,560.00 in benefits for the period of March 17, 2019 and May 11, 2019. The claimant must repay the overpaid benefits. The employer's account shall be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs