

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARIEL E DE MOTA

Claimant

APPEAL NO. 13A-UI-08064-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 06/16/13

Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Ariel De Mota filed a timely appeal from the July 9, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on August 14, 2013. Mr. De Mota participated. Luis Meza, Human Resources Assistant, represented the employer. Spanish-English interpreter Anna Pottebaum assisted with the hearing. Exhibit A was received into evidence.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ariel De Mota was employed by Swift Pork Company, d/b/a JBS, as a full-time cut floor production worker from June 2012 until June 20, 2013, when Aureliano Diaz, Interim Human Resources Supervisor, discharged him from the employment for repeatedly violating the employer's safety policy. The safety policy provisions included a requirement that employees wear a protective face shield while using the mechanical knife sharpener. Mr. De Moto used a knife to perform his cut floor duties and was responsible for keeping his knife sharp. The safety policy also indicated that two violations of the safety policy within a 12-month period would result in termination of the employment. The employer had posted the updated policy and had reviewed the policy with Mr. De Mota and other employees as part of monthly safety meetings. Mr. De Mota's primary language is Spanish and the employer had provided the policy to him in Spanish.

In July 2012, Mr. De Mota had failed to wear the protective face shield while using the mechanical sharpener to sharpen his work knife and had suffered injury to his eye when a piece of metal entered his eye. Mr. De Mota had to be transported to an emergency room for medical treatment.

On June 20, 2013, a supervisor witnessed Mr. De Mota again sharpening his knife without wearing the required protective face shield. The supervisor intervened to have Mr. De Mota stop grinding his knife. The supervisor sent Mr. De Mota to the human resources department and Mr. De Mota was discharged from the 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 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) alone. 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 evidence in the record establishes that Mr. De Moto knowingly and intentionally violated the employer's safety policy on June 20, 2013, when he used a mechanical knife sharpener without wearing the required protective face shield. Ms. De Moto was well aware that the protective face shield was required. The June 20, 2013 violation followed a similar violation 11 months earlier that had resulted in Mr. De Moto suffering an eye injury. Mr. De Moto's failure to wear the required protective gear, especially in light of the earlier violation and injury, was in willful and wanton disregard of the employer's interest in maintaining a safe workplace.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. De Moto was discharged for misconduct. Accordingly, Mr. De Moto is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The agency representative's July 9, 2013, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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