

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JOEL A CONKEY
722 EVANS ST
SLOAN IA 51055-8097**

**BEEF PRODUCTS INC
891 TWO RIVERS DR
DAKOTA DUNES SD 57049**

**Appeal Number: 06A-UI-05687-JTT
OC: 04/30/06 R: 01
Claimant: Respondent (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Beef Products filed a timely appeal from the May 22, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on June 19, 2006. Claimant Joel Conkey participated. Human Resources Coordinator Wendy Stemken represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Joel Conkey was employed by Beef Products as a full-time warehouse coordinator from July 6, 2005 until April 10, 2006, when the employer's human resources office and corporate office discharged him.

The final incident that prompted the discharge is alleged to have occurred on April 7, 2006. On that date, Mr. Conkey was operating a forklift in the normal course of his duties. At some point, Mr. Conkey thought he made contact with a pallet, noted no damage to the pallet and proceeded with his duties. Another employee was present, but gave no indication that Mr. Conkey had made contact with anything other than a pallet and gave no indication that anything had been damaged. Mr. Conkey was not aware that he had caused any damage. The employer subsequently noticed damage to a taco cooker. Human Resources Manager Jennifer Horken and another individual reviewed video surveillance records and concluded that Mr. Conkey had caused the damage to a taco cooker. Neither Ms. Horken nor the other individual who reviewed the video surveillance testified at the hearing and the videotape was not presented as evidence.

On April 9, Mr. Conkey's immediate supervisor, warehouse supervisor Randy Birkes, confronted Mr. Conkey and asked him why he had not told the employer about hitting the taco cooker. Mr. Conkey told Mr. Birkes that he was unaware that he had hit the taco cooker. Mr. Birkes told Mr. Conkey that the employer had the incident on videotape. Mr. Conkey indicated that if he had, in fact, hit the taco cooker, he would take full responsibility for his actions. It is unclear whether Mr. Birkes had personally reviewed the video surveillance records. Mr. Birkes did not testify at the hearing.

On February 13, 2006, Mr. Conkey was reprimanded after an oversized item, a tumbler, fell off the blades of his forklift as he was turning a corner. Mr. Birkes had instructed Mr. Conkey to take the item to another area of the workplace. The two men discovered that the blades of the forklift were not long enough to carry the item. Mr. Conkey wanted to get forklift blade extenders before attempting to transport the item, but Mr. Birkes decided instead to use a couple pieces of wood to stabilize the item on the blades of the forklift. The item became unstable when Mr. Conkey attempted to negotiate a corner.

Approximately six months before he was discharged, Mr. Conkey received another reprimand in connection with two incidents. In one of the incidents, Mr. Conkey had placed a truck in park and stepped out for a moment to take care of other business related to his duties. Before Mr. Conkey could get back into the truck, the truck began to roll. The truck collided with another object. The gearshift was still in the park position when the truck was recovered. The second incident involved Mr. Conkey backing over a piece of pipe that was sticking up out of the ground and concealed by weeds. Mr. Conkey had been relying upon backing instructions from a coworker, who failed to observe the pipe before Mr. Conkey backed over it.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Conkey was discharged for misconduct in connection with the employment. It does 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 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). 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 employer has failed to meet its burden of presenting direct and satisfactory evidence to support its allegation of misconduct. The employer had the ability to present testimony from an employee who may have witnessed the incident that prompted the discharge, testimony from the individuals who reviewed the video surveillance, and/or the videotaped surveillance. The evidence presented falls short of proving that Mr. Conkey was negligent or careless in performing his duties in connection with the final incident that prompted his discharge. Accordingly, the evidence fails to demonstrate a final "current act" of misconduct that might serve as the basis for disqualifying Mr. Conkey for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Conkey was discharged for no disqualifying reason. Accordingly, Mr. Conkey is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Conkey.

DECISION:

The Agency representative's decision dated May 22, 2006, reference 02, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/kkf