

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RONALD L HOUK
Claimant

APPEAL NO. 12A-UI-05906-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARGILL INCORPORATED
Employer

OC: 04/08/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the May 11, 2012, reference 03, decision that allowed benefits. After due notice was issued, a hearing was held on June 13, 2012. Claimant participated. Ben Wise, Hiring Supervisor, represented the employer. Exhibits One through Five were 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: Ronald Houk was employed by Cargill Incorporated as a full-time production worker from February 27, 2012 until April 12, 2012, when Human Resources Associate Kirstie Horton discharged him for alleged falsification of a pre-employment physical form. The employer had Mr. Houk answer a 57-question pre-employment medical survey on January 13, 2012. The questions were printed in exceptionally small font and were printed in English and Spanish. The English version of the questions appeared in shaded areas of the form and were each followed by the Spanish version of the question. The English version of the questions cannot be discerned from the exhibit the employer provided for the hearing. See Exhibit Three. The employer alleges that Mr. Houk falsified his answer to question number 13. Question number 13 appears as expunged material on the exhibit the employer provided for the hearing. See Exhibit Three. A nurse wrote some additional notes on the back of the form. In connection with completed the form, Mr. Houk provided information that indicated he had no prior back injury. Mr. Houk provided the information by checking a box that followed the question.

Mr. Houk graduated from high school and is currently a college student. Mr. Houk received special education services as part of his K-12 curriculum.

On April 11, Mr. Houk went to the company nurse due to back pain. In connection with that visit, Mr. Houk completed a Back Evaluation form. On the form, Mr. Houk marked the yes box

that followed the question of whether he had any previous history of back problems. Mr. Houk also marked the yes box after the question that asked whether he had seen a chiropractor. Mr. Houk marked the no box after the question that asked whether he had a history of back surgery.

Mr. Houk was injured in 2011 in the course of performing work for Wal-Mart. In connection with that matter, Mr. Houk had a single visit with a chiropractor and required no other medical evaluation or treatment.

The employer's nursing staff and/or human resources staff reviewed the pre-employment medical survey and the Back Evaluation form and noted a discrepancy between the information indicated on the pre-employment medical survey and the Back Evaluation form. Human Resources Associate Kirstie Horton concluded Mr. Houk had falsified information on the pre-employment medical survey and discharged him from the employment. The employer had a written policy that indicated employees would be terminated for "Dishonesty, falsification, or misrepresentation of compensation/benefit information, medical information, safety information, criminal history and/or work history."

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). 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 present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish misconduct in connection with the employment. The employer did not present testimony from a single witness with personal knowledge of the matters that factored in the discharge. The employer has the ability to present such testimony. The employer presented a pre-employment survey form that is for all purposes illegible. The employer had the ability to present a legible exhibit. The employer has failed to present sufficient evidence to rebut the claimant's assertion that any omission of reference to a prior back injury was inadvertent oversight on his part.

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

DECISION:

The Agency representative's May 11, 2012, reference 03, decision 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css