

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ABOTSI, ABRA, X**  
Claimant

**APPEAL NO. 10A-UI-17463-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 11/07/10**  
**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 December 14, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 1, 2011. Claimant participated. Jenny Mora represented the employer. French English interpreter Jacques Weissgerber assisted with the hearing.

**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: Abra Abotsi was employed by Swift & Company as a full-time production work until October 22, 2010, when the employer discharged her from the employment for alleged insubordination. Ms. Abotsi has limited English skills. Ms. Abotsi's primary language is French. On October 22, Ms. Abotsi was at the end of a 12-hour shift when someone approached her at the production line and said she needed to go to the office to meet with an insurance representative. It was the employer's open enrollment period. Ms. Abotsi already had insurance. Ms. Abotsi told the employer she already had insurance and stayed at the production line. A production supervisor, Raphael Santos, then came to the production line and yelled at Ms. Abotsi to go to the office to speak with the insurance representative. Ms. Abotsi again explained that she already had insurance. The supervisor yelled at Ms. Abotsi in front of the coworkers also present on the line in a way that humiliated Ms. Abotsi. Mr. Santos yelled at Ms. Abotsi that she needed to go to the office to sign a form. Ms. Abotsi ultimately acquiesced in going to the office, but then the insurance representative was not there. Ms. Abotsi was made to wait for the insurance representative to return. When the insurance representative returned he repeatedly directed Ms. Abotsi to sign a form. The form was in English. Ms. Abotsi does not read English. Ms. Abotsi explained that she did not understand English and offered to have her husband come to the plant to explain that she already had insurance. After the insurance representative was finished with

Ms. Abotsi, Cheryl Hewlett, Human Resources Manager, discharged Ms. Abotsi for allegedly being insubordinate.

### **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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence to establish misconduct in connection with the final incident that triggered the discharge. The employer failed to present testimony from any one with personal knowledge of the incident. The weight of the evidence indicates that while the employer might have had a reasonable basis for wanting Ms. Abotsi to report to the office, the supervisor communicated this in an unreasonable, inappropriate manner without appropriate explanation. The evidence also establishes that Ms. Abotsi had a reasonable basis for declining to meet with an insurance representative. She already had insurance, and did not fully understand what was being asked of her and why. Ms. Abotsi reasonably declined to sign an insurance form that she did not understand. The weight of the evidence fails to establish insubordination. Because there was no misconduct in connection with the final incident, the administrative law judge need not address the employer's allegation of misconduct based on an incidence two and a half years earlier.

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

**DECISION:**

The Agency representative's December 14, 2010, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs