

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA M WARD
Claimant

APPEAL NO. 17A-UI-04173-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CACTUS OPERATING LLC
Employer

OC: 03/26/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Tina Ward filed a timely appeal from the April 12, 2017, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Ms. Ward was discharged on April 12, 2017 for insubordination in connection with the employment. After due notice was issued, a hearing was held on May 17, 2017. Ms. Ward participated personally and was represented by non-attorney representative Jon Geyer. Caroline Hicks represented the employer and presented testimony through Jennifer Randolph and Kevyn Mumaw. Exhibits A, C through P and 1, 2, and 3 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: Tina Ward has a college degree in animal science. Ms. Ward was employed by Cactus Operating, L.L.C. as a full-time herdsman from 2013 until March 29, 2017, when Jennifer Randolph, Farm Manager, and Caroline Hicks, Human Resources Director, discharged her from the employment. Ms. Randolph became Ms. Ward's supervisor in November 2015. Breeding Supervisors Kevyn Mumaw and Tricia Clingman worked under Ms. Randolph and had authority to assign tasks to Ms. Ward. Ms. Ward performed various duties throughout the employment as part of her herdsman responsibilities. Early in the employment, Ms. Ward's supervisors noted that Ms. Ward excelled at documentation duties, but appeared to lack motivation when it came to the more physical duties involved in the employment.

Ms. Ward suffered a workplace injury to her right knee in January 2015, when a sow ran into her and caused Ms. Ward to hit her knee on a crate. The injury did not require surgery, but the doctor who evaluated the injury referred Ms. Ward to physical therapy for six weeks. When Ms. Ward's condition did not improve, the doctor referred Ms. Ward to a sports medicine specialist.

In January 2016, Ms. Ward again suffered a workplace injury to her right knee when a gilt ran into her knee and caused Ms. Ward to tumble. In addition to the injury to her right knee, Ms. Ward suffered injury to her right wrist and to her back. None of the injuries required surgery. The evaluating doctor placed Ms. Ward's right knee in an immobilizer for a week and a half and then released Ms. Ward to light-duty work. The doctor released Ms. Ward to return to her full duties on July 19, 2016.

Ms. Ward established worker's compensation claims in connection with her workplace injuries. Those legal matters were still pending at the time the employer discharged Mr. Ward from the employment on March 29, 2017. At the time of discharge, Ms. Ward was awaiting authorization of payment for an MRI. Ms. Randolph was aware of Ms. Ward's workplace injuries, of her light-duty status, and of her release to full duty. Ms. Randolph was not privy to the status of the legal matters at the time of the discharge.

Following Ms. Ward's release to full duty in July 2016, Ms. Randolph began to document work performance issues concerning Ms. Ward. On August 2, 2016, Ms. Randolph documented that Breeding Supervisor Tricia Clingman had told Ms. Ward she was expected to help with weaning each work day since she was no longer on work restrictions.

On August 11, 2016, Ms. Randolph documented that everyone but Ms. Ward had reported for work at 5:00 a.m. to perform weaning duties, but that Ms. Ward had shown up later and only weaned three crates of pigs.

On August 17, 2017, Ms. Randolph documented that Breeding Supervisor Tricia Clingman reported Ms. Ward had only helped wean three crates of pigs. Ms. Randolph documented that Ms. Ward was sitting in the office when Ms. Randolph arrived to start her work day. Ms. Ward documented that Ms. Ward had not "scraped the breed barn" for three days.

Ms. Ward and the employer signed a last chance agreement in January 2017. The last chance agreement referenced general performance concerns and the following incidents. Ms. Ward was late for work on August 26, 27 and 28, 2016 and was not present to assist her coworkers with breeding duties. On December 8, 2016, Ms. Ward had arrived at the workplace on time, but then reported to her work area too late to assist her coworkers with the breeding duties. Ms. Ward was required to "shower in" when she arrived for work. On December 12, Ms. Ward did not report to her work area until 7:20 a.m. On December 12, December 29, and January 5, Ms. Ward did not assist her coworkers with weaning duties. One December 28, 2016, Breeding Supervisor Tricia Clingman had instructed Ms. Ward to "set up boards" in room 13 and perform other tasks in preparation for weaning. On the next day, Ms. Clingman documented that Ms. Ward had not performed the assigned duties. On January 9, 2017, Ms. Randolph discovered Ms. Ward loitering in the office while Ms. Ward was supposed to be assisting her coworkers with weaning pigs. Later that morning, Mr. Mumaw sent Ms. Ward to assist with vaccinating piglets. Two coworkers had started performing vaccination duties. Ms. Ward elected to perform non-essential documentation, rather than vaccinate pigs.

From March 20, 2017 until the discharge on March 29, 2017, Ms. Ward performed farrowing duties. Ms. Ward had performed similar duties earlier in the employment. The farrowing duties included feeding sows, power washing, castrating and tail docking. The farrowing duties also involved vaccinating the piglets. The employer allowed the farrowing employees to arrive at work at 5:00 a.m. and work until 1:00 p.m. or arrive at work at 7:00 a.m. and work until 3:00 p.m. Ms. Ward is a single-parent and usually chose to arrive at work at 7:00 a.m. so that she could get her minor children ready for school in the morning before she reported for work. Some of

Ms. Ward's coworker's elected to start their work days at 5:00 a.m. These staggered start times meant that when Ms. Ward arrived for work at 7:00 a.m., she was often arriving after her coworkers had commenced or completed the morning's priority projects.

The final incident that triggered the discharge involved Ms. Ward's failure to follow the instructions that Ms. Randolph provided to Ms. Ward on March 29, 2017 with regard to vaccinating piglets with an iron-filled syringe. The piglets were two days old and each weighed three to five pounds. On that morning, Ms. Randolph observed that Ms. Ward was not following the established protocol for iron injections. The two-step protocol required that Ms. Ward scoop the piglet off the ground with one hand so that none of the pig's limbs was touching the ground and then administer the iron injection on the pig's back next to the pig's head. The purpose of the lifting the pig off the ground was to immobilize the pig while the injection was taking place to avoid potential harm to the pig. The purpose of placing the iron injection in the designated location on the pig's back near the pig's head was to minimize the pig's pain during the vaccination process. Ms. Ward knew how to properly perform the work pursuant to the two-step protocol. On the morning of March 29, 2017, Ms. Randolph walked to room nine where Ms. Ward was working to tell Ms. Ward that she had missed vaccinating three litters of pigs in room 10. When Ms. Randolph entered room nine, she observed that Ms. Ward appeared to be leaning into the pig crate and administering the iron injections without picking up the pigs. Ms. Randolph told Ms. Ward that she needed to pick up every pig to ensure it received the iron shot in the correct location. Ms. Ward responded, "Okay." Ms. Randolph then moved on to other duties. Several minutes later, Ms. Randolph returned to the area and observed that Ms. Ward once again appeared to be administering the iron injections without lifting the pigs. Ms. Randolph then directed Kevyn Mumaw, Breeding Supervisor, to go observe how Ms. Ward was administering the iron injections. Mr. Mumaw went to room nine and observed that Ms. Ward was leaning over the crate with her left hand resting on crate while she had her right hand down in the crate with the iron syringe. Mr. Mumaw observed Ms. Ward for 20 to 30 seconds during which time Ms. Ward injected several pigs without picking up the pigs. Mr. Mumaw reported his observations to Ms. Randolph. When Ms. Ward had finished vaccinating the pigs in room nine, she went to room 10 and vaccinated the pigs she had previously missed. Ms. Ward then moved on to other duties. During that morning, Ms. Randolph consulted with Ms. Hicks in preparation to discharging Ms. Ward from the employment. Shortly after noon, Ms. Randolph summoned Ms. Ward to a meeting and issued a written reprimand to Ms. Ward for failure to follow Ms. Randolph's instructions while vaccinating the pigs. Ms. Randolph referenced a last chance agreement Ms. Ward had signed in January 2017. Ms. Randolph then discharged Ms. Ward from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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 weight of the evidence in the record establishes that Ms. Ward did indeed fail to follow the instructions that Ms. Randolph provided to her on March 29, 2017. The weight of the evidence establishes that Ms. Ward knew the correct two-step protocol for vaccinating the pigs before Ms. Randolph reminded her follow the protocol on March 29. The employer's directive was reasonable and adhered to the industry standard for humanely vaccinating the pigs. After Ms. Ward acknowledged the protocol on March 29, she then elected immediately thereafter not to follow the protocol and elected instead to vaccinate several pigs without picking them up. Ms. Ward was physically capable of picking the three-to-five pound pigs up to vaccinate them properly. Ms. Ward's intentional deviation subsequent to the instruction to follow the protocol was observed separately by Ms. Randolph and Mr. Mumaw. The evidence fails to provide a reason to discount the employer's testimony regarding those observations. The employer was familiar with both the vaccination process and the physical layout of room nine. The weight of the evidence establishes that Ms. Randolph and Mr. Mumaw each concluded Ms. Ward had not followed the protocol because they specifically observed her not following the protocol. Ms. Ward did not have a reasonable basis for not following the protocol.

The weight of the evidence establishes that the failure to comply with the vaccination protocol on March 29, 2017 was indeed part of a pattern of intentional work avoidance in the face of reasonable directives to perform duties within the scope of the employment, as well as a pattern of carelessness and negligence. The pattern was sufficient to indicate intentional and substantial disregard of the employer's interests and to establish misconduct in connection with the employment. Accordingly, Ms. Ward is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount. Ms. Ward must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The April 12, 2017, reference 01, decision is affirmed. The claimant was discharged on March 29, 2017 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs