

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A BRITTON

Claimant

APPEAL NO. 10A-UI-02164-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

OC: 01/17/10

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

David Britton filed a timely appeal from the February 10, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 30, 2010. Mr. Britton participated and presented additional testimony through Scott Clemens. At the scheduled start of the hearing, the employer indicated it was waiving its right to participate in 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: David Britton was employed by Tyson Fresh Meats, Inc., as a full-time scribe saw operator from April 2006 until January 22, 2010 when Elaina Ritter, Human Resources Manager, discharged him in connection with an alleged sexual harassment incident that was supposed to have occurred on December 28, 2009.

On December 28, Mr. Britton was attempting to move between two employees when he accidentally brushed against a female coworker. The female coworker was upset by the physical contact. Mr. Britton offered and agreed to escort the female coworker to the Human Resources office. Later that same day, Mr. Britton attempted to speak with the Human Resources Manager, Elaina Ritter, who indicated she would get back to Mr. Britton. Three days later, the Human Resources Manager interviewed Mr. Britton. Mr. Britton explained the accidental nature of the contact on December 28.

On January 10 or 11, the Human Resources Manager summoned Mr. Britton and had him sign his acknowledgment of the employer's work rules regarding sexual harassment.

On January 22, the Human Resources Manager summoned Mr. Britton to the office and discharged him from the employment based on the incident alleged to have occurred on

December 28, 2009. The employer did not notify Mr. Britton until January 22, 2010 that the incident alleged to have occurred on December 28, 2009 subjected him to possible discharge 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). 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 waived its right to participate in the appeal hearing and thereby has failed to present any evidence whatsoever to support the allegation that Mr. Britton was discharged from the employment for misconduct. The evidence in the record fails to establish misconduct. The evidence in the record also fails to establish a current act. See 871 IAC 24.32(8). The evidence indicates that the alleged incident came to the employer's attention on December 28 but that the employer waited until January 22, 2010 to notify Mr. Britton that the alleged incident subjected him to possible discharge from the employment.

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

DECISION:

The Agency representative's February 10, 2010, reference 01, decision is reversed. 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/pjs