

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

NELSON JIMENEZ
Claimant

BRAND ENERGY SOLUTIONS LLC
Employer

APPEAL NO. 19A-UI-08870-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 09/29/19
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 October 30, 2019, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on September 27, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on December 5, 2019. Claimant Nelson Jimenez did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Trenton Kilpatrick of ADP/Corporate Cost Control represented the employer and presented additional testimony through Chad Guidry. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 5 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nelson Jimenez was employed by Brand Energy Solutions, L.L.C. as a full-time, seasonal Industrial Blaster/Painter until September 27, 2019, when Chad Guidry, Midwest Account Manager, discharged him from the employment. Mr. Jimenez began his employment with Brand Energy Solutions 2016 and had most recently been recalled to the seasonal employment in March 2019. The employer reviewed its safety protocol with Mr. Jimenez at the start of the employment. Mr. Jimenez thereafter had to demonstrate proficiency in site-specific safety before commencing work on the job site. In August 2019, the employer moved Mr. Jimenez and other crew members from a project in Clinton, Iowa to a smaller project in Ohio. Mr. Jimenez's

assigned tasks on the Ohio project involved sand blasting and painting a fall protection station on a railroad track. Supervisor and Quality Control Inspector Tony Reagan was Mr. Jimenez's immediate supervisor on the project.

The sole incident that factored in the discharge occurred on September 27, 2019. On that day, Mr. Jimenez performed sand blasting from the "man basket" of a mechanical lift. Mr. Jimenez had performed the same work without incident since he began working on the assignment. Mr. Jimenez was working five to six feet above the ground surface. Mr. Jimenez was wearing the required fall protection harness as he worked. Mr. Jimenez's safety harness included six-foot long retractable lanyards that Mr. Jimenez was supposed to secure to the OSHA-approved anchors on the floor inside the man-basket. On September 27, Mr. Reagan and the client's project supervisor observed that Mr. Jimenez had secured his safety harness to the handrail of the man-basket, rather than to the OSHA-approved anchors on the floor of the man-basket. The handrail consisted of a half inch or three-quarter inch metal tube that was not an OSHA-approved anchor point and that would not have supported Mr. Jimenez's weight in the event of a fall. Mr. Reagan and the client's project supervisor reported it to Mr. Guidry. Mr. Guidry reported to the work site and spoke with Mr. Jimenez. Mr. Jimenez explained that he could not reach the area he needed to blast without anchoring his safety harness to the hand rail of the man-basket. The employer disagreed with that determination and concluded that Mr. Jimenez could have moved the man-basket to a different position so that the safety vest could be properly anchored while Mr. Jimenez performed the blasting duties. Mr. Jimenez is a non-native English speaker and his primary language is Spanish. Mr. Guidry's discussion of the matter with Mr. Jimenez was impacted somewhat by the language barrier. The employer deemed Mr. Jimenez to have violated a one of its life-saving rules. The life-saving rules were intended to apply in situations where there could be immediate risk of death if the rule was violated. Under the employer's policy, violation of a life-saving rule was to result in automatic termination of the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)(a) provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

The weight of the evidence establishes a discharge for no disqualifying reason. The employer was reasonably concerned about workplace safety. Given that Mr. Jimenez was working five to six feet off the ground, a reasonable person would conclude that Mr. Jimenez's conduct did not place him at immediate risk of death. In this isolated instance, Mr. Jimenez did not fully comply with the safety protocol. Mr. Jimenez wore the safety harness and secured the safety harness, but for work expediency reasons that he attempted to explain to the employer, he did not secure the harness to the approved anchor point. Though Mr. Jimenez's logic was flawed, the weight of the evidence establishes an isolated lapse or error in judgment, rather than a willful and wanton disregard of the employer's interests. Mr. Jimenez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The October 30, 2019, reference 01, 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/scn