

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEVEN E ORSI
Claimant

APPEAL NO. 17A-UI-01027-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AMERISTAR CASINO COUNCIL BLUFFS
Employer

OC: 01/01/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Steven Orsi filed a timely appeal from the January 23, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Orsi was discharged on January 3, 2017 for violation of a known company rule. After due notice was issued, a hearing was held on February 17, 2017. Mr. Orsi participated personally and was represented by Kim Tiedemann. Klaren Bentley of Equifax represented the employer and presented testimony through Tammy Denman and Lorraine Howard.

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: Steven Orsi was employed by Ameristar Casino Council Bluffs as a full-time baker from June 2016 until January 3, 2017, when Lorraine Howard, Executive Pastry Chef, discharged him for violating the employer's lye safety procedures. Ms. Howard was Mr. Orsi's immediate supervisor. Mr. Orsi's work duties regularly included assisting in preparing pretzels. As part of that process, Mr. Orsi would have to handle lye. Mr. Orsi would have to collect a measured amount of lye in a measuring cup by pumping the lye from a large container. When Mr. Orsi was dealing with the lye, he was required to wear protective safety glasses and protective gloves to protect against being injured by the caustic liquid. When Mr. Orsi was done handling the lye, he was required to immediately and thoroughly rinse the measuring cup to prevent himself and coworkers from being injured by the clear, caustic liquid. When Mr. Orsi was done handling the lye, he was required to immediately and thoroughly rinse the protective gloves and set them to dry so that the next person to use the gloves, whether that was him or a coworker, would not be injured by residual lye. Mr. Orsi was familiar with the safety protocol for handling lye.

The employer's decision to suspend and discharge Mr. Orsi from the employment followed the third lye-related injury resulting from Mr. Orsi not following the protocol. The final incident

occurred on December 24, 2016, when Mr. Orsi failed to wear the protective safety glasses. As Mr. Orsi was pumping lye into the measuring cup, some of the liquid lye splashed up out of the measuring cup onto Mr. Orsi's face and into his eye or eyes. Ms. Howard became aware of the situation as Mr. Orsi was rinsing the splashed lye out of his eyes and off his face. Ms. Howard made certain that Mr. Orsi received immediate medical evaluation. Ms. Howard confirmed that the safety glasses were in the cabinet where they were stored for Mr. Orsi and others to use when handling lye.

On December 8, 2016, one of Mr. Orsi's coworkers received a lye chemical burn to her hand in connection with wearing the protective gloves. Before that injury occurred, Mr. Orsi had been the most recent employee to use the gloves when he used them the day before the injury. Mr. Orsi did not thoroughly rinse the gloves of lye and did not store the gloves so that they could properly air dry. There was liquid lye in one of the gloves when Mr. Orsi's coworker tried to use them. At the time Ms. Howard addressed the matter with Mr. Orsi, Mr. Orsi asserted there had been a hole in one of the gloves.

In August 2016 another of Mr. Orsi's coworker's received a lye burn injury when she handled a tub of dirty dishes that contained the measuring cup Mr. Orsi had used to collect and measure lye. Mr. Orsi had not rinsed the measuring cup after using it and had not alerted anyone to the presence of residual lye in the measuring cup. The employer had recently implemented a policy of taking dirty dishes to the dish room rather than washing them immediately in the bakery area. That policy did not apply to the lye measuring cup, which needed to be rinsed immediately to prevent risk of chemical burn. The cup had been in the tub for seven hours between the time Mr. Orsi had left it there and coworker handled the tub and suffered the burn. The employer issued a reprimand to Mr. Orsi in connection with the incident.

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).

The weight of the evidence establishes three separation instances in which Mr. Orsi was responsible for someone being injured. While Mr. Orsi was not responsible for the malfunctioning pump in connection with the final incident, he was responsible for not wearing the required protective gear. Mr. Orsi knew the safety glasses were required when handling lye, regardless of how busy the bakery was. Mr. Orsi elected not to wear the safety glasses. By doing so, he exposed himself to greater potential injury and exposed the employer to potential liability in connection with the injury. The weight of the evidence establishes that Mr. Orsi was negligent in connection with the measuring cup injury in August 2016. Mr. Orsi knew the measuring cup needed to be rinsed immediately after use to prevent injury. If Mr. Orsi had any question about whether he should immediately rinse the measuring cup in light of the employer's change in the dishwashing protocol, he could have and should have asked. A reasonable person would do that. A reasonable person would, at minimum, notify a supervisor that he had left measuring cup containing caustic lye in the dish tub. Mr. Orsi did not do that and set his coworker up to be injured. The weight of the evidence establishes that Mr. Orsi failed to thoroughly rinse or appropriately dry the gloves in connection with the injury that occurred in early December and, thereby, set his coworker up to be injured. If there had indeed been a hole in the glove, as Mr. Orsi asserted, a reasonable person would have brought that to the employer's attention before that situation could factor in an injury.

Based on the pattern of conduct and the seriousness of the safety violations, the administrative law judge concludes that Mr. Orsi was discharged for misconduct in connection with the employment. Accordingly, Mr. Orsi is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Orsi must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The January 23, 2017, reference 01, decision is affirmed. The claimant was discharged on January 3, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs