

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

THOMAS A SIMMONS
Claimant

APPEAL NO. 18A-UI-08297-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 07/08/18
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Swift Pork Company, (employer) appealed a representative's July 26, 2018, decision (reference 01), that concluded Thomas Simmons (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 24, 2018. The claimant participated personally. The employer participated by Nicolas Aguirre, Human Resources Director. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on March 17, 2014, as a full-time maintenance technician. He signed for receipt of the employer's handbook on March 18, 2014. The handbook contained policies regarding lockout/tag-out (LO/TO) procedures and "cardinal rules". The claimant received safety training that included LO/TO procedures. If an employee violated LO/TO procedures, the employer could retrain the employee, issue the employee a reprimand, or terminate the employee. The employer did not issue the claimant any warnings during his employment.

The claimant previously worked for the employer as a full-time scale technician from June 11, 1990, to January 21, 2013. He was terminated for violation of a safety rule. When he was rehired he was placed on the employer's red hat safety team committee.

The employer had numerous machinery disconnect switches that looked like light switches. These switches were mounted vertically and horizontally. The "on" position for the machinery was not consistently in the up or right position. The employer knew of this problem and the situation was not remedied.

On June 26, 2018, the claimant and a new employee were supposed to replace a reflector on a conveyor and the conveyer had to be turned off. The claimant was told to replace the reflector when the employee with knowledge of the system was absent. Flipping the conveyor switch one way or the other would not tell the claimant whether the conveyer was off or on. He had to guess which was off. The claimant flipped the switch to what he thought was the off position. He was also supposed to place a lock on the conveyor.

If the claimant placed a lock on the conveyor and the claimant guessed incorrectly, the claimant could not stop the conveyor with the switch if it started. The claimant did not place a lock on the conveyor. The claimant climbed on the conveyor to replace the reflector. The conveyor started to move. The new employee flipped the switch the other direction and the conveyor stopped. If the conveyor had been locked, the new employee could not have stopped the conveyor and the claimant might have been injured. On June 30, 2018, the employer terminated the claimant for violation of a "cardinal rule".

The claimant filed for unemployment insurance benefits with an effective date of July 8, 2018. The employer provided the name and number of Vicky Cervantes as the person who would participate in the fact-finding interview on July 25, 2018. The fact-finder called Ms. Cervantes but she was not available. The fact-finder left a voice message with the fact-finder's name, number, and the employer's appeal rights. The employer did not respond to the message. The employer provided some documents for the fact finding interview. The employer did not identify the specific rule or policy that the claimant violated which caused the separation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Repeated failure to follow an employer's instructions in the performance of duties is misconduct. *Gilliam v. Atlantic Bottling Company*, 453 N.W.2d 230 (Iowa App. 1990). In general, an employer has a right to expect employees to follow instructions in the performance of the job. The claimant disregarded the employer's right by failing to follow the employer's instructions on one occasion.

The question of whether the refusal to perform a specific task constitutes misconduct must be determined by evaluating both the reasonableness of the employer's request in light of all circumstances and the employee's reason for noncompliance. *Endicott v. Iowa Department of Job Service*, 367 N.W.2d 300 (Iowa App. 1985).

While it is reasonable for the employer to have safety and LO/TO rules to protect the welfare of employees, it is not reasonable when those rules could harm employees. In the situation at hand, the claimant could have been injured if he had followed the procedures and locked out. The employer knew the problem with the disconnect switches. The claimant had a good reason for not following LO/TO procedures in this instance. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's July 26, 2018, decision (reference 01), is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn