

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA J EDWARDS
Claimant

APPEAL NO. 14A-UI-00608-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 12/08/13
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 10, 2014, reference 01, decision that allowed benefits to the claimant provided she was otherwise eligible and that held the employer's account could be charged. After due notice was issued, a hearing was held on February 7, 2014. Claimant Melissa Edwards did not provide a telephone number for the hearing and did not participate. Luis Meza represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two and Three into evidence. The administrative law judge took official notice of the agency's administrative record (Clear2There Hearing Control Screen) that documents the claimant's failure to provide a telephone number for the hearing.

The fact-finding materials were not available at the time of the appeal hearing. In light of that and in light of the claimant's absence from the hearing, the administrative law judge could not adjudicate whether the employer participated in the fact-finding within the meaning of the law.

ISSUES:

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

Whether the claimant was overpaid benefits.

Whether the claimant must repay benefits.

Whether the employer's account may be charged for benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Melissa Edwards was employed by Swift Pork Company, a/k/a JBS, on a full-time basis from 2008 until November 29, 2013, when the employer discharged her from the employment. During at least the last two years of the employment, Ms. Edwards was a Cut Floor Supervisor. Ms. Edwards' supervisor was Dave Feedback.

The final incident that triggered the discharge concluded Ms. Edwards' failure to address a lack of sanitizer on the production line she supervised. Employees working on that production line were required to periodically dip their blades in "hot boxes" containing a mixture of water and sanitizer. The purpose of the requirement was to ensure food safety by preventing contamination of meat. On November 11, Ms. Edwards participated in a staff meeting at which Mr. Feedback discussed cut floor operational deficiencies, including issues with the sanitizing system. Mr. Feedback specifically reminded Ms. Edwards that she was responsible for ensuring that the sanitizer system was operating properly. If Ms. Edwards had an issue with the "hot boxes" malfunctioning, all she had to do was summon maintenance to address the problem. Ms. Edwards was otherwise responsible for ensuring that sanitizer was loaded into the system. On November 15, 2013, Mr. Feedback checked the sanitizer system on Ms. Edwards' line and found there was not sanitizer in the water that was running through that system. Mr. Feedback suspended Ms. Edwards on November 15, 2013. When Mr. Feedback later interviewed Ms. Edwards about the matter on November 29, 2013, Ms. Edwards asserted that the sanitizer system had been broken and that she thought it was the maintenance department's responsibility to address the issue. Ms. Edwards had not summoned the maintenance department to address the matter.

The final incident that triggered the discharge followed another incident in February 2013 wherein Ms. Edwards removed a USDA and a JBS quality control tag from a "combo" holding a ton of meat and entered the meat back into production. Only the USDA inspector or the JBS quality control personnel was authorized to remove such tags. Removal of the tag could prompt a recall of meat product and result in financial loss to the company. Ms. Edwards knew that she was not authorized to remove the quality control tags.

The final incident that triggered the discharge followed another incident in March 2013, wherein Ms. Edwards reached into a machine without authorization in violation of the employer's lock-out/tag-out protocol. Though power was disengaged from the machine, Ms. Edwards was not authorized to reach into the machine and her conduct in doing so was a safety violation.

Ms. Edwards established a claim for benefits that was effective December 8, 2013 and received \$3,672.00 in benefits for the period of December 8, 2013 through February 8, 2014.

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 evidence in the record establishes misconduct in connection with the employment based on three safety violations in 2013. The final incident involved negligence on the part of Ms. Edwards through her failure to address the sanitizer issue. One of the prior incidents in 2013 involved Ms. Edwards' violation of food safety protocol by removing quality control tags without authorization. The other 2013 violation of employer work rules involved Ms. Edwards

placing herself at risk of injury by reaching into a machine without authorization and in violation of the lock-out/tag-out policy.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Edwards was discharged for misconduct. Accordingly, Ms. Edwards is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account will not be charged for benefits paid to Ms. Edwards after the entry date of the present decision.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. Because this decision disqualifies Ms. Edwards for benefits, the \$3,672.00 in benefits paid to Ms. Edwards for the period of December 8, 2013 through February 8, 2014 constitutes an overpayment of benefits. A claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer will be charged for the overpaid benefits. Iowa Code § 96.3-7-a, -b.

The matter of deciding whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Benefits Bureau.

DECISION:

The Agency representative's January 10, 2014, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The claimant is overpaid \$3,672.00 for the period of December 8, 2013 through February 8, 2014. The employer's account will not be charged for benefits paid to Ms. Edwards after the entry date of the present decision. The matter of deciding whether the amount overpaid should be recovered from the claimant and charged to the employer under Iowa Code § 96.3-7-b is remanded to the Benefits Bureau.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs