

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HUGO TALAVERA

Claimant

APPEAL NO. 11A-UI-04275-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

OC: 02/20/11

Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 30, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 28, 2011. Claimant did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Jim Hook, Human Resources Manager, represented the employer.

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: Hugo Talavera was employed by Tyson Fresh Meats as a full-time production worker from 2008 until February 15, 2011, when the employer discharged him for violating the employer's break policy.

The final incident that triggered the discharge occurred on February 8, 2011. Mr. Talavera was supposed to start a 15 minute break at 9:15 a.m. The employer witness does not know when Mr. Talavera went to break or when he came back. At some point, the claimant's supervisor located Mr. Talavera sitting in a locker room. On that same day, the supervisor issued a written reprimand.

On July 1, 2010, the employer issued a written reprimand for returning late from a break. Mr. Talavera was supposed to start a 15 minute break at 9:15 a.m. The employer witness does not know how long Mr. Talavera was gone on break.

On December 21, 2010, the employer issued a written reprimand for an unauthorized break. Mr. Talavera was supposed to start his break at 11:45 a.m., but was located in a locker room at 11:30 a.m.

On January 14, 2011, the employer issued a written reprimand after Mr. Talavera returned from break seven minutes late.

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.

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 § 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 fails to establish a current act of misconduct. The evidence indicates that the final incident that triggered the discharge occurred on February 8, 2011 and came to the employer's attention on that day. The claimant was discharged on February 15, 2011, a week after the incident. In the meantime, the claimant continued to report for work and perform his duties. The evidence fails to establish that the employer notified the claimant prior to February 15, 2011 that the incident from February 8 could result in his discharge from the employment. The evidence fails to establish a reasonable basis for the one-week delay between the incident that triggered the discharge and notice to the claimant that the incident could or would result in his discharge. In addition, the employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to establish there was a break infraction on February 8, 2011. While the employer alleges an infraction, the employer witness lacked information regarding when the claimant went on break and when he returned from break. The employer had the ability to present testimony from someone with personal knowledge of the incident, but elected not to. Misconduct cannot be established. The next most recent incident that factored into the discharge occurred on January 14, 2011. The weight of the evidence establishes that the claimant started his break early without authorization. This incident, absent evidence to prove more recent conduct, cannot serve as a basis for disqualifying the claimant for benefits.

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

DECISION:

The Agency representative's March 30, 2011, reference 01, decision is reversed. The discharge was not based on a current act of misconduct. 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