

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HUNG V LUONG

Claimant

APPEAL NO. 08A-UI-04940-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HORMEL FOODS CORPORATION

Employer

**OC: 04/20/08 R: 02
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Hormel Foods Corporation filed a timely appeal from the May 14, 2008, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 9, 2008. Claimant Hung V. Luong participated. Todd Yocum, Plant Superintendent, represented the employer. Vietnamese-English interpreter Phung Nguyen assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One and Two into evidence.

ISSUE:

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

Whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Hung Luong was employed by Hormel Foods Corporation from April 25, 2005 until April 18, 2008, when Plant Superintendent Todd Yocum discharged him. Mr. Luong's immediate supervisor was Matt Bumgun, Night Packaging Supervisor.

The final incident that prompted the discharge occurred on April 18, 2008. On that date, Mr. Luong forcibly removed a guard on his assigned machine with authorization. Mr. Luong had not reported any problems with the machine to the employer. When Mr. Luong's immediate supervisor confronted him about removing the guard, Mr. Luong became agitated and argumentative. Mr. Luong asked the supervisor whether the supervisor was "fucking stupid." The supervisor was concerned for his own safety and the safety of another employee assigned to work in the same area. The supervisor directed the coworker to remove all knives from the work area. The supervisor then directed Mr. Luong to go home for the day. Mr. Luong refused to leave the workplace without speaking to the plant superintendent. The plant superintendent arrived, interviewed Mr. Luong concerning the incident, and sent Mr. Luong home. On April 21,

Erin Montgomery, Plant Controller, reinterviewed Mr. Luong about the incident. The plant superintendent and the plant controller then discharged Mr. Luong from the employment.

On April 9, Mr. Luong had refused to work with another employee who had been assigned to fill in for the employee who normally worked alongside Mr. Luong. Mr. Luong took the position that the substitute employee did not perform work to Mr. Luong's satisfaction. The employer counseled Mr. Luong for 45 minutes before he agreed to return to his work station.

Mr. Luong established a claim for benefits that was effective April 20, 2008 and has received benefits totaling \$2,880.00.

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).

An employer has the right to expect decency and civility from its employees and an employee’s use of profanity or offensive language in a confrontational, disrespectful, or name-calling context may be recognized as misconduct disqualifying the employee from receipt of unemployment insurance benefits. Henecke v. Iowa Department of Job Service, 533 N.W.2d 573 (Iowa App. 1995). Use of foul language can alone be a sufficient ground for a misconduct disqualification for unemployment benefits. Warrell v. Iowa Dept. of Job Service, 356 N.W.2d 587 (Iowa Ct. App. 1984). An isolated incident of vulgarity can constitute misconduct and warrant disqualification from unemployment benefits, if it serves to undermine a superior’s authority. Deever v. Hawkeye Window Cleaning, Inc. 447 N.W.2d 418 (Iowa Ct. App. 1989).

The evidence indicates that on April 18, Mr. Luong directed offensive and profane language at his immediate supervisor in challenge to the supervisor’s authority. At the same time, Mr. Luong adopted an aggressive demeanor and posture. Mr. Luong’s utterance and conduct constituted substantial misconduct in connection with the employment that disqualifies Mr. Luong for unemployment insurance benefits.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee’s failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer’s request in light of the circumstances, along with the worker’s reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee’s second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The evidence indicates that on April 18, Mr. Luong’s immediate supervisor reasonably requested or directed that Mr. Luong leave the workplace for the day because Mr. Luong was behaving in an aggressive, disrespectful manner. Mr. Luong unreasonably refused to comply with the supervisor’s directive. The evidence indicates that on April 9, Mr. Luong unreasonably refused the employer’s reasonable directive to work with another employee. Mr. Luong’s

repeated unreasonable refusal to follow the employer's reasonable directives was insubordination. Mr. Luong's insubordination was misconduct in connection with the employment that disqualifies Mr. Luong for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Luong was discharged for misconduct. Accordingly, Mr. Luong is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Luong.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Luong has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Luong must repay to Iowa Workforce Development. Mr. Luong is overpaid \$2,880.00.

DECISION:

The Agency representative's May 14, 2008, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$2,880.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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