

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRY A STRANG
Claimant

APPEAL NO. 13A-UI-00984-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 12/23/12
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Employer filed a timely appeal from a representative's decision dated January 17, 2013, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on February 26, 2013. The claimant participated. The employer participated by Mr. Javier Sanchez, Human Resource Assistant Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for intentional misconduct in connection with his work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Terry Strang was employed Swift Pork Company from September 4, 1996 until December 26, 2012 when he was discharged from employment. Mr. Strang worked as a full-time production worker and was paid by hour. His immediate supervisor was Scott Doran.

Mr. Strang was suspended and then discharged for an incident that had taken place on or about December 15, 2012. On that date the claimant was performing his duties as a barn worker herding hogs to a weighing area. In an effort to move the hogs along Mr. Strang banged a hammer that he was carrying on the side of the enclosure to cause movement of the hogs. While performing this activity Mr. Strang was approached by a female security guard who complained about the noise that he was making. Mr. Strang, in responding to the security guard, made a reference to an incident that had happened years before at a shooting range and likened that event to the noise that he was creating by hitting the impoundment with his hammer.

The security guard took Mr. Strang's reference to a handgun as threatening and complained to the company about Mr. Strang's conduct. The security guard alleged to the company that Mr. Strang had been "in her face" at the time. Because the claimant had received a warning for

making a reference to a handgun eight years before, the employer found the security guard's version of the events to be more credible and discharged Mr. Strang from his employment.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the employer has sustained its burden of proof in establishing intentional disqualifying misconduct on the part of this claimant. It has not.

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 insurance benefits. Conduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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 a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

Allegations of misconduct without additional evidence shall not be sufficient to result in a 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 might expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

While hearsay evidence is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony providing that the direct testimony is credible and not inherently improbable.

In the case at hand Mr. Strang appeared personally and provided sworn testimony testifying with specificity that he did not intend to intimidate or coerce a female security guard by making a reference to the loudness of the discharge of a handgun but speaking to the security guard after she complained about the noise level that he was creating by hitting a hog confinement with a hammer. Mr. Strang testified under oath that his intent was not to intimidate or coerce and that he did not get in the security guard's "face" and that his reference was only meant to be agreement that the loud noises can surpass hearing protection and be distracting. The administrative law judge finds the claimant's testimony to be credible and not inherently improbable. In contrast the employer has relied on hearsay testimony to establish that Mr. Strang intentionally violated company policy by making threatening statements to a security guard.

The question before the administrative law judge in this case is not whether the employer had a right to discharge Mr. Strang for these reasons but whether the discharge is disqualifying under the provision of the Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, the administrative law judge concludes for the above-stated reasons that the employer has not sustained its burden of proof in establishing intentional disqualifying job misconduct on the part of the claimant. While the claimant's reference to the volume of noise created in a shooting range may have showed poor judgment, the claimant did not intend it to violate company policy. Unemployment insurance benefits are allowed providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated January 17, 2013, reference 01, is affirmed. The claimant was discharged under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed