

**IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI**

**CHUOL BUOL  
317 ONTARIO ST  
STORM LAKE IA 50588**

**FRIESEN USA INC  
2897 EXPANSION BLVD  
STORM LAKE IA 50588**

**Appeal Number: 05A-UI-04966-JTT  
OC: 04/10/05 R: 01  
Claimant: Respondent (1)**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Friesen USA (employer) filed a timely appeal from the May 5, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 3, 2005. The claimant did not respond to the notice of the hearing and did not participate in the hearing. The Appeals Bureau had secured an interpreter to assist the claimant with the hearing. The employer participated through Terry Pearson, Plant Safety and Personnel Manager. Exhibits One and Two were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Chuol Buol was employed by Friesen USA as a full-time, second-shift Parts Cleaner from

November 15, 2004 until April 6, 2005, when Terry Pearson, Plant Safety and Personnel Manager, discharged him for misconduct.

Mr. Buol's native language is Nuer. The employer was aware that Mr. Buol had limited English skills. The employer attempted to overcome the language barrier by stating things to Mr. Buol in a number of different ways.

The final incident that prompted the discharge occurred on April 5, 2005. During Mr. Buol's shift on that date, one or more plant employees observed Mr. Buol operating a forklift at the plant and told him to stop. Mr. Buol continued to operate the forklift. The next morning, the unauthorized operation of the forklift was reported to Mr. Pearson. Mr. Pearson met with Mr. Buol, and Mr. Buol admitted to operating the forklift. The employer then discharged Mr. Buol "for violating safety policy and for not following safety manager's instructions."

Mr. Buol was not authorized to operate the forklift. During March 2005, Mr. Buol took the written portion of the forklift test three times without passing. As preparation for the test, the employer first had Mr. Buol watch a videotape on safe operation of the forklift. The employer then provided Mr. Buol a pamphlet to study on his own. Mr. Buol then had to pass a 15-question written test before the employer would provide any hands-on training in operating the forklift. The written test was multiple-choice. On Mr. Buol's first attempt at the written test, he incorrectly answered eight questions. On his second and third attempt at the test, Mr. Buol incorrectly answered six or seven questions. After Mr. Buol failed the written test for the third time, Mr. Pearson told Mr. Buol that he would not be allowed to operate the forklift.

The employer has a written safety policy that is set forth in a handbook. Mr. Buol would have received a copy of the handbook upon hire. Under the policy, all employees and supervisors, are charged with the responsibility for their own personal safety and the safety of others present in the plant. Under the policy, "negligence or carelessness in operation of tools, or any other generally accepted unsafe act, may be regarded as cause for disciplinary action or dismissal."

Prior to the date of discharge, Mr. Buol had received no reprimands. Prior to the incident that prompted his termination, Mr. Buol had not operated the forklift.

#### REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Buol was discharged for misconduct in connection with his employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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). Before the administrative law judge can find that an employee was discharged for misconduct, the evidence in the record must establish the existence of a "current act" of misconduct. See 871 IAC 24.32(8). 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).

The evidence in the record fails to establish that Mr. Buol was discharged for misconduct. Mr. Buol's difficulty with the English language calls into question the extent to which he understood any instructions the employer provided, including instructions regarding his authorization to operate the forklift. The language difficulty calls into question whether the employer fully understood information conveyed by Mr. Buol. Mr. Buol's difficulty with the English language specifically calls into question the employer's assertion that on April 5, 2005 an employee told Mr. Buol to get off the forklift and Mr. Buol told the employee that the employee was not his boss. The employer did not present testimony from any eyewitness to the alleged misconduct. The administrative law judge questions the reliability of Mr. Pearson's testimony. That testimony was at odds with information set forth in the employer's exhibits with regard to details, names of people involved etc. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the evidence in the record is insufficient to prove the allegation of misconduct. See 871 IAC 24.32(4). The

administrative law judge concludes that Mr. Buol was discharged for no disqualifying reason. Accordingly, Mr. Buol is eligible for benefits, provided he meets all other eligibility requirements.

DECISION:

The Agency representative's decision dated May 5, 2005, reference 01, is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

jt/pjs