

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CARLOS C DOMINGUEZ**

Claimant

**APPEAL NO: 18A-UI-06915-TN**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**

Employer

**OC: 06/03/18**

**Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Carlos C. Dominguez, the claimant, filed a timely appeal from a representative's unemployment insurance decision dated June 19, 2018 (reference 01), which denied unemployment insurance benefits, finding that he was discharged from work on June 1, 2018 for violation of a known company rule. After due notice was provided, an in-person hearing was held in Spencer, Iowa, on August 16, 2018. Claimant participated. A Spanish language interpreter provided interpretation services. Employer participated by Ms. Joannetta Ebarra, Human Resource Manager. Claimant's Exhibit 1 was admitted into the hearing record. Mr. Dominguez had requested a subpoena duces tecum to compel the employer to provide videos of occurrences related to his job separation, the employer's sexual harassment video, and claimant's report numbers 127068338 and 127484571, to the company's help line on April 11 and June 1, 2018. On July 24, 2018, a subpoena duces tecum was issued to the employer for these items. The employer did not respond to the subpoena and provided none of the subpoenaed items prior to the hearing.

**ISSUE:**

The issue is whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Carlos C. Dominguez was employed by Tyson Fresh Meats, Inc. from May 17, 2007 until June 1, 2018, when he was discharged from employment. Mr. Dominguez worked as a full-time production worker and was paid by the hour. His last immediate supervisor was Mr. Sam Muse.

Mr. Dominguez was terminated from his employment with Tyson Fresh Meats, Inc. after he complained to the company that another production worker, Walter Martinez, was sexually harassing Mr. Dominguez. Company policy prohibits sexual harassment and/or creating a hostile work environment for employees. Employees are required by company policy to report any violations to the company human resource department.

Mr. Dominguez previously reported that Mr. Martinez was trying to start physical altercations with him after Mr. Dominguez reported Mr. Martinez and other workers in his department for arriving to work late in the morning and from breaks.

Mr. Dominguez believes that after he reported the other workers for their late arrivals, Mr. Dominguez's supervisor informed the other workers about Mr. Dominguez's complaints to the company.

Shortly after making his complaint to the company about the tardiness of workers in April, 2018, Mr. Dominguez was accosted and threatened by Mr. Martinez. Although Mr. Dominguez had reported Mr. Martinez's behavior, he was given a warning suspension from work, but Mr. Martinez was not suspended.

Mr. Martinez's harassment of Mr. Dominguez continued in the form of Mr. Martinez repeatedly instigating physical altercations and making statements to Mr. Dominguez with overt homosexual connotations.

Mr. Dominguez used the company's "helpline" on two occasions to obtain assistance from the company about the on-going harassment from the other worker. Mr. Dominguez used the company's helpline on April 9, 2018 and again on June 5, 2018.

In May, 2018, Mr. Dominguez informed company management that the harassment by Mr. Martinez was continuing. The claimant's immediate supervisor told the claimant that he might be terminated if he filed his complaint with the company.

Although the company asserted that Mr. Dominguez might be discharged if he complained about Mr. Martinez, claimant continued the complaint process. Ms. Ebarra, the facilities human resource manager, was assigned to investigate. Ms. Ebarra interviewed Mr. Martinez, the claimant, and other crew members. Some of those had been identified as late arriving workers, and some who had not. Ms. Ebarra also reviewed a security video at Mr. Dominguez request. Mr. Dominguez's was also allowed to review the security video.

Mr. Dominguez testified that the security video clearly shows Mr. Martinez as the person engaging in harassing behavior depicting simulated homosexual activity. Mr. Dominguez testified that the security video clearly shows that the other worker was the party engaging in the inappropriate behavior, and not Mr. Dominguez.

It is the employer's position that because a number of the individuals in the work area who were interviewed identified Mr. Dominguez as the aggressor; a decision was made to impose disciplinary suspension on the claimant for sexual harassment on Mr. Martinez.

Company policy provides for the termination of an employee who has been suspended from work twice within a one year period. Because Mr. Dominguez had been suspended on one occasion earlier within a one year period, the second suspension subjected him to termination of employment.

It is the claimant's belief that the company chose to suspend him and subsequently discharge him because of an incident in the past where Mr. Dominguez had reported a company supervisor to the police.

Mr. Dominguez categorically denies engaging in any inappropriate behavior. He believes he was suspended and subsequently discharged for reporting inappropriate conduct by a co-worker.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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).

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).

In the case at hand, the claimant was required to report allegations of sexual harassment to company management under established company policy. Because he was sexually harassed by another employee in his department, Mr. Dominguez reported the other employee's conduct and asked the company to review security camera video in the work area to corroborate his allegations that Mr. Martinez was making the work-place hostile. In response to his request, the claimant was threatened with possible discharge.

Mr. Dominguez testified that the video clearly shows the other worker making homosexual type gestures towards him and does not show Mr. Dominguez engaging in unacceptable conduct. The employer's witness asserts that the surveillance video shows Mr. Dominguez as the offending party and therefore the employer was justified in suspending the claimant from work and was thus subject to discharge because he had two suspensions in one period.

The administrative law judge notes that the claimant had requested a subpoena duces tecum for the production of the surveillance video and other documents, and a subpoena was issued to the employer prior to the hearing, but the employer did not respond by producing the video tape and documents.

Based upon the employer's failure to comply with the subpoena to produce the video and other documents in question, the administrative law judge concludes that the subpoenaed video and documents was more direct evidence which exposed deficiencies in the employer's case. The administrative law judge finds the claimant's testimony with respect to the contents of the video to be true and accurate and finds that the weight of evidence is established in favor of the claimant.

The administrative law judge concludes that the claimant was discharged from his employment with Tyson Fresh Meats, Inc. for no disqualifying reason. Accordingly, the claimant is eligible to receive unemployment insurance benefits, provided that he meets all eligibility requirements of Iowa law.

**DECISION:**

The representative's unemployment insurance decision dated June 19, 2018, reference 01, is reversed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terry P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

tn/scn