IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PERRY M KUHN
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL NO. 17A-UI-06520-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/21/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Perry Kuhn (claimant) appealed a representative's June 22, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Hormel Foods Corporation (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 13, 2017. The claimant was represented by Jim Lauer and Bob Christian, Attorneys at Law, and participated personally. The employer was represented by Alice Rose Thatch, Hearings Representative, and participated by Jeremy Rummel, Plant Manager, and Christian Potocnik, Manager of Plant Engineering.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 3, 2012, as a full-time salaried maintenance engineer. The employer did not have a handbook for salaried employees. The employer posted the tobacco policy. The policy allows employees to use tobacco in their cars and in the parking lots. If an employee does something wrong, the employer documents the infraction and places it in the employees file. The employee may or may not know about the documentation. The employee may ask to examine the file to discover the documentation and request copies.

On December 10, 2012, the employer told the claimant to spit out his chewing tobacco. The claimant thought his behavior was acceptable because he had been working outside in the parking lot all day and the employer did not give him a break. On June 21, 2013, the claimant approached a machine that was broken down and in sanitation mode. This was a new situation for the claimant and he was not trained on the lock-out/tag-out procedure for this situation. A worker told him what he should lock-out/tag-out. The claimant followed his instructions. A supervisor approached the area and did the same procedure as the claimant. Later the claimant learned that the lock-out/tag-out procedure was incorrect. A week later the employer issued the claimant a suspension for failure to properly lock-out/tag-out.

On September 19, 2015, the employer documented that the claimant had overslept. The claimant did oversleep on occasion. The employer scheduled the claimant to work nights during the week and days on the weekend. The claimant did not hear his alarm. On February 22, 2017, the claimant tested positive for alcohol and the employer agreed to his absence for rehabilitation. The claimant successfully completed his rehabilitation.

On May 4, 2017, the claimant was in the parking lot of the plant. He was supposed to travel from dock to dock with a van truck and its driver. There was not room for the claimant to sit in the passenger seat of the van truck. The van truck had a platform on the back on which the claimant rode while the van truck proceeded at a very low rate of speed. The claimant was also chewing tobacco in the parking lot. The plant manager saw the claimant and told him he was going to check with the corporate office to see if riding on the platform was a safety issue.

On May 5, 2017, at 9:30 a.m., the plant manager sent the claimant home. The claimant returned to the plant on May 5, 2017, at 3:30 p.m. at the request of a human resources employee. Human resources informed the claimant he was being suspended for being unsafe and he should return to work on May 12, 2017.

On May 12, 2017, the claimant returned to work. He worked without incident until May 18, 2017. On May 18, 2017, the employer told the claimant he was discharged for lock-out/tag-out infractions and recent performance violations.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. 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 on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on May 4, 2017. The employer had issued a suspension for the incident. The claimant was discharged until May 18, 2017, and no other infraction occurred. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. The employer did not provide the claimant written policies or written warnings. The employer did not meet its burden of proof to show misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's June 22, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs