

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ANGEL J AGUILERA**  
Claimant

**APPEAL NO. 17A-UI-04399-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 03/19/17**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Swift Pork Company (employer) appealed a representative's April 14, 2017, decision (reference 01) that concluded Angel Aguilera (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for May 15, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Nicolas Aguirre, Human Resources Manager. Emily Klootwyk, Assistant Human Resources Manager observed the hearing. Exhibit D-1 was received into evidence. Exhibit D-1 was received into evidence. The employer offered and Exhibit One was received into evidence.

**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 November 12, 2012, as a full-time general laborer. Employees usually sign for receipt of the employer's handbook at their time of hire. On January 10, May 28, and August 27, 2014, the employer issued the claimant warnings for job performance and failure to follow instructions. The employer did not notify the claimant that further infractions could result in his termination from employment. On June 2, 2016, the employer issued the claimant a written warning for using inappropriate language and kicking a trash can. On August 16, 2017, the employer issued the claimant a written warning for attendance. The employer notified the claimant each time that further infractions could result in termination from employment.

On March 9 or 10, 2017, the claimant was working when the company the employer contracts with to clean the plant appeared in the claimant's area. The cleaning company uses dangerous chemical foam and is supposed to announce their presence to workers. They started cleaning without telling workers they were in the area and the foam landed on worker's sides and faces. The claimant had previously sought medical attention after being sprayed by the foam. He told

the cleaner three times to announce before spraying foam. The cleaner said she did not see or hear the claimant. The claimant complained about the cleaner to the employer. The cleaner said the claimant threw things at her. The employer investigated. Five of the employees who worked for the employer did not see the claimant throw anything. The cleaner and her co-worker said the claimant threw two or numerous items at them. The employer terminated the claimant on March 15, 2017.

On April 20, 2017, the employer rehired the claimant under a last chance agreement.

The claimant filed for unemployment insurance benefits with an effective date of March 19, 2017. He received \$1,341.00 in benefits after the separation from employment. The employer participated at the fact finding interview on April 11, 2017, by Alice Noble. She did not have firsthand knowledge of the events leading to the separation.

#### **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).

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). The claimant was terminated after a cleaner accidentally sprayed hazardous foam at him. The two accusatory statements are sufficiently divergent to cast doubt on their veracity. One says the claimant spit on the cleaner and the cleaner's statement does not mention it. One indicates two items were thrown. The other says numerous items were thrown by the claimant. The employer did not provide sufficient evidence of misconduct at the appeal hearing. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The representative's April 14, 2017, decision (reference 01) is affirmed. 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/scn