

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KELLY, LARRY, D
Claimant

APPEAL NO. 11A-UI-04159-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PREPARED FOODS INC
Employer

**OC: 02/13/11
Claimant: Appellant (2)**

Iowa Code § 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 28, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 27, 2011. Claimant participated. The employer provided a telephone number for the hearing and named a representative: Ron Wood at 319-236-9444. But the employer was not available at the designated number at the time set for the hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Larry Kelly was employed by Tyson prepared foods as a full-time production worker until February 9, 2011, when Ron Wood, Human Resources Representative, discharged him from the employment. The final incident that triggered the discharge occurred on February 8, 2011. Mr. Kelly was supposed to use a plastic rod to check for metal in meat product as it came down the production line. Mr. Kelly was not paying sufficient attention to his duties and failed to remove the plastic rod from the production line after he used it to check for metal. The plastic rod continued down the production line and somehow caused damage to product or machinery. The employer sent Mr. Kelly home from work early and directed him to show up the next day. When he showed up the next day, the employer discharged him from the employment.

Mr. Kelly had one prior reprimand during the employment. That matter concerned an incident sometime in 2010, wherein Mr. Kelly dumped the wrong spice in a meat product mixture. Mr. Kelly thought the production team had moved on to the next work order, but the production team was in fact still working on an earlier work order.

REASONING AND CONCLUSIONS OF LAW:

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.

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 § 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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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).

The employer failed to appear for the hearing and thereby failed to present any evidence to support an allegation that Mr. Kelly was discharged for misconduct in connection with the employment. The weight of the evidence establishes that Mr. Kelly was negligent in performing his duties on February 8, 2011, when he left a tool on the production belt. There is insufficient evidence in the record to establish carelessness or negligence in connection with the incident that led to the prior reprimand. The evidence fails to establish a willful or wanton disregard of the employer's interests. The evidence establishes an isolated incident of ordinary negligence, which is insufficient to establish misconduct in connection with the employment that would disqualify Mr. Kelly for unemployment insurance benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Kelly was discharged for no disqualifying reason. Accordingly, Mr. Kelly is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Kelly.

DECISION:

The Agency representative's March 28, 2011, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs