

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SELENE D CABALLERO BORGES
Claimant

APPEAL NO. 14A-UI-06358-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 06/01/14
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Selene Caballero Borges filed a timely appeal from the June 20, 2014, reference 01, decision that disqualified her for benefits and that relieved the employer of liability for benefits in connection with a June 3, 2014 discharge from Tyson Fresh Meats, Inc. After due notice was issued, a hearing was held on July 14, 2014. Ms. Caballero Borges participated personally and was represented by attorney Mary Hamilton. The employer was not available at the number the employer had provided for the hearing and did not participate in the hearing. Spanish/English interpreter Steven Rhodes assisted with the hearing.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Selene Caballero Borges is a Spanish-speaking person. She does not speak or write English. Ms. Caballero Borges was employed by Tyson Fresh Meats, Inc. as a full-time production worker for over a year until June 6, 2014 when the employer discharged her for allegedly failing to disclose a medical issue concerning her foot when she applied for the employment. Ms. Caballero Borges had not knowingly or intentionally omitted any information in connection with her application for employment. Ms. Caballero Borges had assistance with completing the application materials and believed she had provided all information requested by the employer. While Ms. Caballero Borges had a prior issue with her foot, a year or two before her employment, she understood the employer's application materials to be asking about prior surgeries. Ms. Caballero Borges had not had surgery on her foot. Throughout the employment, Ms. Caballero Borges was able to perform her assigned work to the employer's satisfaction. Any issue she had previously had with her foot did not factor in the employment until the employer alleged that she had falsified her application materials.

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.

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). 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).

Iowa Admin. Code r. 871-24.32(6) provides:

(6) False work application. When a willfully and deliberately false statement is made on an Application for Work form, and this willful and deliberate falsification does or could result in endangering the health, safety or morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy, such falsification shall be an act of misconduct in connection with the employer.

The employer did not participate in the hearing and did not present any evidence to support the allegation that Ms. Caballero Borges falsified any aspect of her application materials. The evidence in the record does not indicate any intentional omission, any attempt to mislead the employer, or any other misconduct in connection with the employment. The weight of the evidence indicates that Ms. Caballero Borges' foot issue, from a year or two before the employment, did not factor in the employment until the employer belatedly alleged she had been untruthful at the start of her employment.

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

DECISION:

The claims deputy's June 20, 2014, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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