

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALLEN L BEHRENS
Claimant

APPEAL NO. 10A-UI-10245-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

OC: 06/13/10
Claimant: Respondent (1)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(8) – Current Act Requirement

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 13, 2010, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on September 3, 2010. Claimant Allen Behrens participated. Maria Bozaan, Human Resources Manager, represented the employer.

ISSUES:

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

Whether the discharge was based on a current act of misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Allen Behrens was employed by West Liberty Foods on a full-time basis from 1990 until June 9, 2010, when Maria Bozaan, Human Resources Manager, Chad Schnepfer, Operations Manager, and Tom Alberty, Plant Manager discharged him from the employment. Mr. Behrens was a production supervisor from 1997 until the end of his employment.

The final incident that triggered the discharge was Mr. Behrens' failure to note documentation entered by a worker under this supervision that indicated some meat being processed was outside the temperature protocol. Mr. Behrens' was responsible for reviewing the documentation and taking appropriate steps to ensure food safety during processing. Another supervisor caught the deviation from the temperature protocol and reported Mr. Behrens' failure to note the deviation to Mr. Behrens' superiors. On May 21, 2010, Mr. Behrens spoke with him about the matter and Mr. Behrens' conceded he had missed the documented deviation from the temperature protocol. Mr. Behrens' continued to perform his regular duties.

On June 2, Maria Bozaan, Human Resources Manager spoke to Mr. Behrens about the incident. The employer had completed its investigation on May 21, but was taking time to

consider whether Mr. Behrens should be discharged from the employment. The employer considered Mr. Behrens' long tenure with the employment. The employer also wanted to ascertain whether it would be open to legal action if it went forward with terminating Mr. Behrens' employment. Ms. Bozaan told Mr. Behrens on June 2 that the employer considered the May 20 incident a serious matter. Ms. Bozaan did not indicate to Mr. Behrens that he faced possible discharge from the employment in connection with the May 20 carelessness.

Mr. Behrens continued to work until June 8, 2010, when the employer summoned him a meeting and discharged him from the employment. The employer had not indicated to Mr. Behrens prior to June 8 that he faced possible discharge from the employment in connection with the May 20 carelessness.

In making the decision to discharge Mr. Behrens from the employment, the employer also considered an incident from February 2010. Mr. Behrens had taken the temperature of some meat being processed and concluded, based on the thermometer reading, that the meat was within the temperature protocol. A quality assurance employee used their thermometer to test the temperature of the meat and concluded that the meat exceeded the temperature protocol by three or four degrees. In response to this input from the quality assurance employee, Mr. Behrens took steps to bring the meat back into the employer's temperature protocol.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 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).

The weight of the evidence in the record fails to establish a current act of misconduct. The weight of the evidence indicates that the incident that triggered the discharge came to the employer’s attention no later than May 21, 2010. The employer then delayed until June 8, 2010, before telling Mr. Behrens that he would be discharged from the employment based on the incident. Prior to that date, the employer had not previously given notice to Mr. Behrens that he faced possible discharge in connection with the May 20 incident. The employer’s 18-day delay between learning of the incident and notifying Mr. Behrens that he faced possible discharge based on the incident was unreasonable and prevented the May 20 incident from qualifying as a “current act” for unemployment insurance purposes. See 871 IAC 24.32(8). In the absence of a current act, the administrative law judge must conclude that Mr. Behrens was discharged for no disqualifying reason.

In the absence of a current act, the administrative law judge need not consider whether the final incident or the earlier incident involved misconduct. See 871 IAC 24.32(8). In any event, the administrative law judge concludes that the May 20, 2010 incident did involve carelessness. The employer had presented insufficient evidence, and insufficiently direct and satisfactory evidence, to establish carelessness, negligence or intentional misconduct in connection with the February 2010 incident. The evidence indicates an incident of ordinary carelessness on May 20, 2010. In the absence of evidence establishing a pattern of conduct indicate a willful disregard of the employer’s interests, the evidence would not establish disqualifying misconduct even if the May 20 incident had qualified as a current act.

Mr. Behrens was discharged for no disqualifying reason. Accordingly, Mr. Behrens is eligible for benefits, provided he is otherwise eligible. The employer’s account may be charged for benefits paid to Mr. Behrens.

DECISION:

The Agency representative's July 13, 2010, reference 01, decision is affirmed. The discharge was not based on a current act. 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/css