

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

THOMAS W NAUMANN
Claimant

APPEAL NO. 09A-UI-18243-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OSCEOLA FOODS CORPORATION
Employer

**Original Claim: 11/08/09
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Thomas Naumann filed a timely appeal from the December 1, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on January 13, 2010. Mr. Naumann participated. Jon Kilpatrick, Human Resources Coordinator, represented the employer and presented additional testimony through Lance Burnette, Team Leader.

The employer's representative of record, TALX, had submitted proposed exhibits to the Appeals Section and had indicated on the submitted materials that the employer representative had provided a copy of the materials to the claimant. Based on this representation, the Appeals Section did not forward a copy of the employer's proposed exhibits to the claimant. The claimant did not receive the materials the employer representative indicated it would provide to the claimant. Because the claimant's due process rights were implicated, the administrative law judge did not receive the employer's proposed exhibits into evidence, but instead counseled both parties that they could provide testimony based on documents in their possession.

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: Thomas Naumann was employed by Osceola Foods Corporation as a full-time production worker from June 2008 until November 10, 2009, when Jon Kilpatrick, Human Resources Coordinator, discharged him from the employment for recurrent carelessness. Mr. Naumann's immediate supervisor was Lance Burnette, Team Leader.

The final series of incidents that prompted the discharge occurred on November 5, 2009. On that date, Mr. Naumann was assigned to enter product information concerning vats of meat product before they were added to the particular product run. The purpose of the assigned task was to make certain that the right product was being added to the product run. On three of the five product runs during that shift, Mr. Naumann failed to enter the correct product information.

Mr. Burnette caught the first error and counseled Mr. Naumann to pay closer attention. Mr. Naumann then made two more similar errors. After each of these, Mr. Burnette again counseled Mr. Naumann to pay more careful attention. Mr. Naumann had appropriate experience and training to perform the assigned task. Mr. Naumann had the ability to perform the assigned duties. On October 30, 2009, Mr. Naumann made a similar error. Prior to these instances, the next most recent incident of carelessness was back in October 2008, when Mr. Naumann failed to properly hose out and clean vats as part of his assigned duties.

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 indicates that Mr. Naumann made four very similar carelessness-based errors within a six-day period. Three of the errors occurred during the same shift with appropriate counseling after each to pay more careful attention. Mr. Naumann had received adequate training and was able to perform the assigned duties. The administrative law judge concludes there were sufficiently recurring instances of carelessness to indicate a willful disregard of the employer's interests in maintaining food safety and production efficiency.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Naumann was discharged for misconduct. Accordingly, Mr. Naumann is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Naumann.

DECISION:

The Agency representative's December 1, 2009, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw