

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BOBBY D HARLAN  
2608 TAFT ST  
PERRY IA 50220-2315**

**APPEAL NO. 09A-UI-18375-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC  
c/o TALX UCM SERVICES INC  
PO BOX 283  
ST LOUIS MO 63166-0283**

**APPEAL RIGHTS:**

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to:

***Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319***

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

The name, address and social security number of the claimant.

A reference to the decision from which the appeal is taken.

That an appeal from such decision is being made and such appeal is signed.

The grounds upon which such appeal is based.

**YOU MAY REPRESENT** yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BOBBY D HARLAN**  
Claimant

**APPEAL NO. 09A-UI-18375-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 11/01/09**  
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 24, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on January 15, 2010. Claimant Bobby Harlan participated. Terry Carmichael, Training Coordinator, represented the employer. Exhibits One through Eleven were received into evidence.

**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: Bobby Harlan was employed by Tyson Fresh Meats, Inc., as a full-time maintenance mechanic from 2002 until November 3, 2009, when the employer discharged him for violating the employer's "hot work permit" safety protocol.

The incident that prompted the discharge occurred on Saturday, October 31, 2009. Mr. Harlan was assigned to replace a metal hanger and had to cut the old one out first. A supervisor directed Mr. Harlan to remove the conveyor belt below the project. Mr. Harlan did not remove the belt, but instead employed a shortcut that the employer uses during the workweek to avoid slowing production. Mr. Harlan got the conveyor belt wet, performed the cut, and then got the belt wet again. Mr. Harlan then left the area to get a necessary part. The employer's "hot work permit" safety protocol required that someone be present at all times when there was risk of fire. Mr. Harlan left the work area for about five minutes without securing someone else to watch the site until he got back. The maintenance staff was short-staffed that day and Mr. Harlan did not think he had the authority to pull another worker to watch the area. In addition, despite the employer's written "hot work permit" requirement that a person be present at all times during work that presented a fire risk, this protocol was not strictly followed or enforced. In leaving the area, Mr. Harlan acted in a manner that might have presented less risk during production when other workers would be in the general area and would notice a fire. The conveyor belt caught fire while Mr. Harlan had stepped away and several staff had to work to put out the fire. When

the supervisor asked Mr. Harlan why he had not removed the belt or obtained someone else to watch the area while he was away, Mr. Harlan explained that he had followed the protocol employed during production instead.

In making the decision to discharge Mr. Harlan from the employment, the employer considered prior reprimands the employer had issued to Mr. Harlan. On January 13, 2009, the employer reprimanded Mr. Harlan for allegedly not seeing a job through to completion. The supervisor was not satisfied with the appearance of work Mr. Harlan and another employee had performed and had them spend more time giving the repair job a more aesthetically pleasing appearance. On October 2, 2009, the employer reprimanded Mr. Harlan for not clocking out for his half hour lunch break. The incident had occurred on Sunday, September 20, 2009. During the production week, the employer did not allow the maintenance mechanics to leave the workplace for lunch break and did not require that they clock out. During the weekend, maintenance mechanics could leave the workplace for lunch break and were expected to clock out if they left the workplace. On October 19, 2009, the employer reprimanded Mr. Harlan for allegedly not being at a job site when he was supposed to be. Mr. Harlan had gone on his 15-minute break and then gone to get a part before he returned to the work site.

The supervisors involved in the investigation of the above incidents and in issuing the discipline are still with the employer, but did not testify. The employer representative lacked personal knowledge of the events in question.

#### **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 administrative law judge notes that the employer did not present any testimony from persons having personal knowledge of the events that factored in the discharge, including the final incident. The employer had the ability to present such testimony.

The weight of the evidence indicates that Mr. Harlan was negligent in failing to either remove the conveyor belt or secure another employee to watch the worksite while he stepped away. Mr. Harlan had received sufficient training to know the reasonable steps he needed to follow to assure there was not fire hazard. The employer’s failure to uniformly follow and enforce the “hot work permit” protocol at all times, including during production, is a mitigating factor. The employer’s failure to staff sufficient employees so that another worker would be readily available to monitor the site while Mr. Harlan was away is another mitigating factor. The evidence fails to establish any additional incidents of carelessness or negligence. Thus, there is no pattern of carelessness and/or negligence so recurrent as to indicate willful or wanton disregard of the employer’s interests. The employer failed to present sufficient evidence, and sufficient direct and satisfactory evidence, to establish misconduct in connection with the prior reprimands.

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

**DECISION:**

The Agency representative's November 24, 2009, reference 01, decision is affirmed. 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