

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TOMAS O EDJANG
Claimant

APPEAL NO. 07A-UI-03989-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/04/07 R: 01
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the April 6, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 7, 2007. Claimant Tomas Edjang participated. Susan Pfeifer, Human Resources Manager, represented the employer and presented additional testimony through Jack Liford, Pork General Supervisor. Spanish-English interpreter Ike Rocha assisted with the hearing. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Claimant's Exhibit A into evidence.

ISSUE:

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

Whether the claimant has been overpaid benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Tomas Edjang was employed by Tyson Fresh Meats as a full-time trimmer from February 17, 2004 until March 8, 2007, when Human Resources Manager Susan Pfeifer and Pork General Supervisor Jack Liford discharged him for insubordination. Mr. Edjang's immediate supervisor was Delmara Orellana, Pork Slice Supervisor.

On March 8, Ms. Orellana approached Mr. Edjang for the purpose of issuing a written counseling, after a USDA inspector observed Mr. Edjang performing work in an unsanitary manner by placing boxes of meat product on a sanitary table. Mr. Edjang had been performing duties other than his regular work duties at the time the USDA inspector made the observation. The counseling form provided Mr. Edjang with the correct instructions for performing the work. Boilerplate language on the counseling form notified Mr. Edjang that future violations could result in further discipline. Mr. Edjang understood that the primary purpose of the counseling form was to document that Ms. Orellano was providing Mr. Edjang with proper instructions. Ms. Orellano is bilingual and explained the form to Mr. Edjang in Spanish. Ms. Orellana directed Mr. Edjang to sign the form and Mr. Edjang refused. Mr. Edjang indicated that he had not previously received specific instructions for performing the work, that he had not been

performing his regular duties, that he had previously performed the same work in the same manner without incident and, therefore, he was not going to sign the form.

After Mr. Edjang refused Ms. Orellana's directive that he sign the counseling form, Ms. Orellana brought the matter to the attention of her supervisor, Pork General Supervisor Jack Liford. Mr. Liford discussed the counseling form and its purpose with Mr. Edjang. Mr. Edjang provided the same reasons for refusing to sign the form. Mr. Liford then brought the matter to the attention of Human Resources Manager Susan Pfeifer, who again discussed the counseling form and its purpose with Mr. Edjang. Prior to this discussion, Ms. Pfeifer asked Mr. Edjang if he needed an interpreter and Mr. Edjang indicated he did not. Mr. Edjang acknowledged the purpose of the form and provided the same reasons for refusing to sign. In the course of the meeting, Mr. Edjang became argumentative. Mr. Edjang refused to sign the form without first speaking with an attorney. Ms. Pfeifer explained that the matter was an internal matter that did not require the involvement of an attorney. Ms. Pfeifer told Mr. Edjang that she thought he was turning a minor issue into something larger. When Mr. Edjang continued the argument, Ms. Pfeifer told Mr. Edjang that he was suspended. Ms. Pfeiffer then directed Mr. Edjang to leave her office. Mr. Edjang initially refused to leave. Ms. Pfeiffer then asked Mr. Edjang to surrender his ID and Mr. Edjang refused to do so. Ms. Pfeiffer then directed Mr. Edjang to leave the employer's property and Mr. Edjang refused to do so. Mr. Edjang telephoned the local police to complain about the perceived unfair treatment. When the police arrived, Mr. Edjang finally left the property. The next day, Mr. Edjang returned for a meeting with the employer, at which time the employer discharged Mr. Edjang.

At all relevant points, Mr. Edjang understood that his signature on the counseling form did not mean that he agreed with the contents of the form or the employer's decision to issue the counseling form.

Mr. Edjang established a claim for benefits that was effective March 4, 2007 and has received benefits totaling \$1,747.00.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes conduct that rose to the level of misconduct. The employer's issuance of the counseling form, to provide Mr. Edjang with instructions to perform work and document that the instructions were being given, was reasonable. The employer's desire to have Mr. Edjang acknowledge receipt of the form was also reasonable. Mr. Edjang's refusal to acknowledge receipt of the counseling was not reasonable. However, the initial refusal to sign the form is not what makes Mr. Edjang's conduct misconduct. The evidence indicates that Mr. Edjang became more unreasonable as the matter progressed through the employer's chain of command. Mr. Edjang did not only refuse the employer's reasonable requests to sign the counseling form. Mr. Edjang also refused to leave Ms. Pfeifer's office, refused to surrender his badge, and refused to leave the employer's property. By the time the interaction concluded, Mr. Edjang had unreasonably refused several reasonable directives. The evidence establishes insubordination.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Edjang was discharged for misconduct. Accordingly, Mr. Edjang 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. Edjang.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because Mr. Edjang received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Edjang must repay to Iowa Workforce Development. Mr. Edjang is overpaid \$1,747.00.

DECISION:

The claims representative's April 6, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements. The employer's account shall not be charged. The claimant is overpaid \$1,747.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css