

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM P ROLAND
Claimant

APPEAL NO. 13A-UI-10128-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ARAMARK CORPORATION
Employer

OC: 08/11/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William Roland filed a timely appeal from the August 30, 2013, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on October 3, 2013. Mr. Roland participated personally and was represented by attorney Danielle Shelton. Luke Shogren represented the employer. Exhibits One through Five and A through H 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: William Roland became an employee of Aramark Corporation in September 2011 when that company took over cafeteria operations at the Nationwide building in Des Moines. Mr. Roland worked in the bakery area, assisted with catering, and assisted with servicing guests. The employment was full time, 5:00 a.m. to 1:30 p.m., Monday through Friday. Josh Burmeister, Executive Chef, was Mr. Roland's immediate supervisor.

The final incident that triggered the discharge occurred on August 6, 2013. On that day, Mr. Roland was assisting a visiting Executive Chef with a fruit garnish and demonstrated to the visiting Executive Chef how to cut the fruit garnish. Mr. Roland used a paring knife. Mr. Roland did not wear a protective cut glove on the hand opposite of the hand in which he held the knife. The employer's established safety rules required that Mr. Roland wear a cut glove at any time he was using a knife. Mr. Roland was aware of the safety rule. The employer routinely reviewed safety rules, including the requirement that employees wear that cut glove. As Mr. Roland was demonstrating how to cut the garnish, Luke Shogren, Food Service Director, walked through the area and reminded Mr. Roland that he needed to wear the cut glove. Mr. Roland was done demonstrating how to cut the garnish and moved on to another task. Later that same shift, Mr. Shogren also reminded the visiting Executive Chef that she needed to wear the cut glove, as she had also not worn the cut glove while cutting fruit.

The employer waited until August 12, 2013, to further address the safety violation with Mr. Roland. On that day, Mr. Shogren notified Mr. Roland that he was discharged from the employment in connection with the safety glove violation and prior, dissimilar disciplinary matters. The next most recent incident that factored in the discharge occurred in May 2013, when Mr. Roland had raised his voice to a Kitchen Lead when she summoned him to the front of the of the kitchen a second time to assist with serving customers during a busy lunch service. The next most recent incident that factored occurred in November 2012, when Mr. Roland engaged in an angry, profane outburst after Mr. Burmeister told him to return some pastries to the oven because they were not sufficiently baked. Mr. Roland directed the outburst at Mr. Burmeister and Mr. Shogren. The next most recent incident that factored occurred in September 2012, when Mr. Roland failed to start cooking meat product needed for a large catering event after being directed to do so by Mr. Burmeister. When Mr. Shogren checked on the status of the product, he learned it had not been started. Mr. Roland had gone on break instead of starting the product. Mr. Shogren and Mr. Burmeister got the product started and Mr. Roland assisted when he returned from break. The next most recent incident that factored occurred in January 2012, when Mr. Roland directed profanity at a coworker while working on the serving line in the vicinity of guests.

The employer has a progressive discipline policy and had issued multiple Final Written Warnings to Mr. Roland prior to the safety violation. The prior discipline included a period of suspension. The employer had most recently evaluated Mr. Roland's performance in September 2012 and had given Mr. Roland high marks at that time.

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 evidence in the record establishes that Mr. Roland was negligent on August 6, 2013, when he failed to wear a cut glove while using a knife to cut fruit. The final incident that triggered the discharge was not Mr. Roland's most significant work rule violation, but it was a work rule violation nonetheless. The evidence establishes that Mr. Roland had previously been negligent in September 2012, when he failed to start the meat product in a timely manner. The question is whether the pattern of conduct, including the final act of negligence, demonstrated a willful or wanton disregard of the employer's interests. Prior to the August 2013 incident, the next most recent incident was the May 2013 outburst. The next most recent incident was the November 2012 outburst. The next most recent incident was the September 2012 failure to start the meat product. The next most recent incident had been the January 2012 outburst. Given the nature and context of the final incident, the lapse of time since the next earlier disciplinary matter, and indeed the dissimilarity to the prior concerns, the administrative law judge does not find the final isolated incident of ordinary negligence to be part of a pattern of conduct indicating a willful and wanton disregard of the employer's interests.

While it was within the employer's discretion to seize upon the relatively minor rule violation to end the employment, the administrative law judge concludes that Mr. Roland's discharge was not based on substantial misconduct in connection with the employment such as would disqualify him for unemployment insurance benefits. Mr. Roland is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The Agency representative's August 30, 2013, reference 01, decision is reversed. 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