

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ARON A ALIBAY
Claimant

APPEAL NO. 17A-UI-02786-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 02/05/17
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Aron Alibay filed a timely appeal from the March 7, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Alibay was discharged on February 9, 2017 for misconduct in connection with the employment. After due notice was issued, a hearing was held on April 5, 2017. Mr. Alibay participated and presented additional testimony through Jody Wells. Terry Carmichael represented the employer. Kunama-English interpreter Stephano Dago of CTS Language Link assisted with the hearing. At the request of the parties, the administrative law judge took official notice of the documents submitted for and created in connection with the March 6, 2017 fact-finding interview and three pages of those materials as Department Exhibits D-1, D-2 and D-3.

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: Aron Alibay was employed by Tyson Fresh Meats, Inc., as a full-time interpreter until February 9, 2017, when Terry Carmichael, Training Coordinator, and Alberto Olguin, Human Resources Manager, discharged him from the employment for abuse of the applicant referral bonus program. Mr. Carmichael was Mr. Alibay's immediate supervisor. Mr. Alibay began the employment in April 2013 as a line worker. Three months into the employment, the employer promoted Mr. Alibay to interpreter. Mr. Alibay is from Eritrea. Mr. Alibay is a fluent speaker of Eritrean languages Kunama and Tigrinya. Mr. Alibay is also a fluent English speaker. Mr. Alibay is able to read and write in English without difficulty. During the employment, Mr. Alibay communicated with the employer and other English-speaking people in fluent English.

The employer has an applicant referral program whereby the employer rewards current employees with up to \$2,000.00 for referring an applicant to the employer. If the applicant is

hired and works for three months, the referring employee is eligible for \$1,000.00. If the applicant works for the six months, the referring employee is eligible for another \$1,000.00. The employer utilizes a Referral Form as documentation of the referral. The form contains blanks for recording the referring employee's name, personnel ID number, assigned shift, and department. The form contains blanks for recording the name of the referred applicant and the referred applicant's Social Security number. The form contains blanks for the signatures of the referring employee, the referred applicant, and the manager who receives and/or approves the referral form. The form contains blanks for each signer to date his or her signature. The form indicates on its face that the form is due before the new hire begins orientation.

The employer's decision to discharge Mr. Alibay from the employment was based primarily on steps Mr. Alibay took in attempt to claim the referral reward for applicant Suduk Fufa. Mr. Alibay did not in fact refer Mr. Fufa to the employment. Mr. Fufa started his new employee orientation on February 6, 2017. On that morning, Mr. Alibay approached Mr. Fufa with the goal of persuading Mr. Fufa to let Mr. Alibay claim Mr. Fufa as an applicant referred by Mr. Alibay. Mr. Alibay had Mr. Fufa write Mr. Fufa's Social Security number on the referring form. Mr. Alibay asked Mr. Fufa to sign the referral form, but Mr. Fufa refused to sign his name in the applicant signature blank. Mr. Alibay knew that he had to turn in the referral form immediately if he hoped to claim the referral bonus. Mr. Alibay signed his own name and then also signed Mr. Fufa's name to the document. Mr. Alibay dated both signatures 2-6-17. Mr. Alibay then presented the referral form to Eloisa Baumgartner, Employment Manager. Ms. Baumgartner signed the referral form in the designated manager signature. The employer thereafter learned from Mr. Fufa that he had not signed the form. On February 7, 2017, Mr. Fufa provided a signed written statement in which he named the employee who had actually referred him to the employment and described how Mr. Alibay had attempted to persuade him to allow Mr. Alibay to claim the referral. Mr. Fufa signature on his written statement was clearly and starkly different than the signature Mr. Alibay had forged on the referral form. On February 7, 2017, the employer suspended Mr. Alibay pending further investigation of the matter. In the course of investigating the matter, the employer learned that Mr. Alibay had approached other employees in an attempt to disingenuously claim them as referred applicants. At the conclusion of the investigation, the employer discharged Mr. Alibay on February 9, 2017.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge notes that Mr. Alibay confirmed during the appeal hearing that he was a fluent English speaker and reader. Mr. Alibay's fluency in English was confirmed by the other two witnesses, one of whom was asked by Mr. Alibay to participate in the hearing.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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 establishes that Mr. Alibay knowingly and intentionally forged Mr. Fufa's signature on an applicant referral form and presented the form to the employer in an attempt to claim a substantial referral bonus to which he knew he was not entitled. In other words, Mr. Alibay attempted to perpetrate a fraud on the employer. To make matters worse, Ms. Alibay attempted to involve another employee in the conduct. Mr. Alibay's actions demonstrated an intentional and substantial disregard of the employer's interests.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Alibay was discharged for misconduct. Accordingly, Mr. Alibay is disqualified for benefits until he has worked in and been paid wages for insured work equal to

ten times his weekly benefit amount. Mr. Alibay must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The March 7, 2017, reference 01, decision is affirmed. The claimant was discharged on February 9, 2017 for misconduct in connection with the employment. 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 amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs