

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FRANCISCO ZAMBRANO-CORONA
Claimant

APPEAL NO. 14A-UI-00325-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 12/01/13
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Disciplinary Suspension/Misconduct

STATEMENT OF THE CASE:

Swift Pork Company (employer) appealed a representative's January 3, 2014, decision (reference 01) that concluded Francisco Zambrano-Corona (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for February 3, 2014. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Aureliano Diaz, Interim Human Resource Manager.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on January 28, 2013, as a full-time third shift load dock employee. The claimant's shift ended at 7:00 a.m. on November 28, 2013, Thanksgiving Day. The claimant was unaware the employer wanted him to work mandatory overtime. It was not posted and the information was spread by word of mouth. The claimant thought his supervisor told him it was fine to leave but it was not. The employer suspended the claimant from November 29 through December 6, 2013, pending investigation. The employer returned the claimant to work after the suspension. The employer thinks of the claimant as a good employee.

The claimant filed for unemployment insurance benefits with an effective date of December 1, 2013. He received \$224.00 in benefits after the separation from employment. The employer did not participate at the fact-finding interview on January 2, 2014.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended from employment for no disqualifying reason.

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(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The employer suspended the claimant for leaving early. The employer did not provide a witness to prove the claimant had been told of the mandatory overtime requirement. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose not to do so. The employer read the claimant's statement into the record. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's January 3, 2014, decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs