

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID M MILICH
Claimant

APPEAL NO. 09A-UI-14632-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEST LIBERTY FOODS LLC
Employer

**Original Claim: 08/30/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

David M. Milich (claimant) appealed a representative's September 24, 2009 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with West Liberty Foods, LLC. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 28, 2009. The claimant participated in the hearing. Monica Dyar appeared on the employer's behalf and presented testimony from one other witness, Michelle Ward. During the hearing, Employer's Exhibits One and Two and Claimant's Exhibit A were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on November 13, 2006. He worked full-time as a slicer operator in the employer's Mount Pleasant, Iowa, meat slicing facility. His last day of work was August 25, 2009. The employer suspended him on August 26 and discharged him on September 1, 2009. The reason asserted for the discharge was a lock-out/tag-out safety violation.

The claimant had received a verbal counseling in September 2008 for an incident in which his arm got caught inside one of the machines while it was running. On July 2, 2009 the employer gave the claimant a suspension for failing to report an unsafe condition for a machine for which the lock-out/tag-out devices were not working properly.

On August 25 the employer investigated three allegations of safety violations on the part of the claimant that day. The employer only determined that one of the allegations was founded, that being an incident in the morning with regard to a belt on a flip-flop conveyer belt. The employer concluded that the belt had come entirely off and that the claimant had put his hand into and under the conveyer mechanism. While it is acceptable to not do a lock-out/tag-out to use a

finger to simply adjust the belt, it is not acceptable to fail to do a lock-out/tag out to replace a belt, requiring the hand to go under the mechanism. The claimant testified that the belt had not come off, that he was only adjusting the belt with his finger as allowed.

Ms. Ward, the production supervisor, testified that she had seen the belt entirely off and saw the claimant put his hand completely into and under the mechanism to put the belt back on. However, the administrative law judge concludes that the testimony of the claimant is more credible on this point than the testimony of Ms. Ward. The administrative law judge notes that during her testimony Ms. Ward continued to maintain the validity of another alleged safety violation she asserted occurred later on August 25, that hosing out a piece of equipment with the blade guard open without a lock-out/tag-out was an additional violation. However, this was an allegation the employer itself had determined was unfounded because standard allowable practice was that a lock-out/tag-out was not required for that function. The testimony of Ms. Ward appears to be inordinately swayed by a desire to justify her decision to take action against the claimant.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the alleged lock-out/tag-out violation on August 25. Assessing the credibility of the witnesses and the reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the belt had come completely off and that the claimant put more than his finger onto the belt to

attempt to readjust the belt; therefore, the employer has not established that a lock-out/tag-out violation occurred that day. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 24, 2009 decision (reference 01) is reversed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw