**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**ERNEST W SHOTZMAN**
Claimant

**SWIFT & COMPANY**
Employer

**APPEAL NO. 09A-UI-19051-JTT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**Original Claim: 11/15/09**
**Claimant: Respondent (1)**

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 11, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 2, 2010. Claimant Ernest Shotzman participated. Tony Luse, Employment Manager, represented the employer.

**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: Ernest Shotzman was employed by Swift & Company/JBS as a full-time production worker from 2001 until November 17, 2009, when Tony Luse, Employment Manager, discharged him for violating safety protocol. On November 17, Mr. Shotzman had just started performing new duties that involved cleaning plastic bags off the floor in the vicinity of the cryovac machine. There were guards around the cryovac machine to prevent employees from being injured. Mr. Shotzman had to get down on the floor to perform his duties. Mr. Shotzman has significant back problems. As Mr. Shotzman rose back to his feet, he felt as spasm in this back. Mr. Shotzman leaned his elbow on the guard shielding the cryovac machine to avoid falling. Mr. Shotzman's new supervisor, Dave Feeback, came by within a minute and saw Mr. Shotzman leaning on the rail in violation of the employer's safety protocol. Mr. Feeback directed Mr. Shotzman to report to the human resources office, where Tony Luse, Employment Manager, discharged him from the employment.

In making the decision to discharge Mr. Shotzman, the employer considered three prior warnings for performance. On April 7, July 23, and July 24, the employer had issued warning to Mr. Shotzman for allowing meat product to touch the floor. Meat product that touched the floor was deemed contaminated and had to be discarded. With regard to the first two incidents, hog bellies had become jammed on the production line and then came at Mr. Shotzman in such quantity that he was not able to keep up and keep the product from going off the production belt

onto the floor. In the last instance, Mr. Shotzman was assigned to throw racks of ribs in large quantity and significant speed. Three of the ribs Mr. Shotzman threw from one belt to the next slid off the belt and onto the floor. In none of these incidents was Mr. Shotzman's unsatisfactory work performance the result of an intentional act.

**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 employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to prove misconduct in connection with any of the incidents that factored into the discharge. The employer had two supervisors assigned to monitor Mr. Shotzman's work on the last day. One of these is the person who found Mr. Shotzman leaning on the guard. The employer failed to present testimony from either supervisor regarding what instructions Mr. Shotzman had been given prior to starting his new clean-up duties on November 17. Mr. Shotzman testified he received no instructions. The evidence indicates that the safety violation that occurred on November 17 involved extenuating circumstances related to Mr. Shotzman's bad back.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Shotzman was discharged for no disqualifying reason. Accordingly, Mr. Shotzman is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Shotzman.

**DECISION:**

The Agency representative's December 11, 2009, reference 01, decision is affirmed. 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/kjw