

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GEBRIEL H AHMED
Claimant

APPEAL NO. 12A-UI-00220-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

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

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

STATEMENT OF THE CASE:

Gebriel Ahmed filed a timely appeal from the December 27, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on February 6, 2012. Mr. Ahmed did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Aureliano Diaz, Human Resources 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: Gebriel Ahmed was employed by Swift Pork Company, also known as JBS, as a full-time production worker from 2010 until November 2, 2011, when Aureliano Diaz, Human Resources Manager, discharged him from the employment. On October 25, 2011, Xaviar Sanchez, Human Resources Assistant, documented an incident alleged to have occurred between Mr. Ahmed and Supervisors Hilda Rodriguez and Felipe Tamayo. In October Mr. Ahmed allegedly refused to follow a directive issued by Ms. Rodriguez to return to his work area. Ms. Rodriguez allegedly enlisted assistance from the second supervisor, Mr. Tamayo. The employer alleges that Mr. Ahmed refused to return to his area, but finally did return to his work area. The employer alleges that Mr. Ahmed directed an obscene gesture toward one or more of the supervisors by raising his middle finger. Mr. Sanchez suspended Mr. Ahmed. About a week later, the employer recalled Mr. Ahmed to the workplace and ended his employment.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause.

See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer has failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to provide misconduct in connection with the employment by a preponderance of the evidence. The employer failed to present testimony from any individual with personal knowledge of the incident that triggered the suspension and discharge. The employer had the ability to present such testimony, but elected not to. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ahmed was discharged for no disqualifying reason. Accordingly, Mr. Ahmed is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Ahmed.

DECISION:

The Agency representative's December 27, 2011, 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