

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JACOB C SMITH

Claimant

APPEAL NO. 12A-UI-04374-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 03/11/12

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 9, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 10, 2012. Claimant participated. Aureliano Diaz, human resources manager, represented the employer. Exhibits One through Six were received into evidence.

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: Jacob Smith was employed by Swift Pork Company, also known as JBS, as a full-time hog production worker in the kill department. The employment started in December 2011 and ended on March 16, 2012, when the employer discharged him for alleged inhumane handling of a hog.

On March 9, 2012, at 12:15 a.m., Mr. Smith was working in a hog pen driving hogs as part of his kill department duties. Mr. Smith was using a paddle as part of his duties. The paddle was to be used on the hogs to guide them, but was not to be used to hurt the hogs. The paddle contained BBs or loose bearings that caused the paddle to make a loud noise if it was hit against an object. This was intended to get the hogs to move in response to the noise. Rich Bouchet, superintendent, was in Mr. Smith's area observing Mr. Smith perform his duties. Mr. Smith was aware that Mr. Bouchet was just several feet away from him. Mr. Bouchet did not say anything to Mr. Smith about how he was performing his duties, but later alleged to Aureliano Diaz, human resources manager, that Mr. Smith had struck a hog with the paddle with above-shoulder force. Had that occurred, it would violate the employer's zero tolerance policy against inhumane treatment of animals and U.S.D.A. regulations against inhumane treatment of animals. Mr. Diaz suspended Mr. Smith on March 9, based on Mr. Bouchet's report. Mr. Diaz later discharged Mr. Smith on March 16, 2012 based on the alleged inhumane treatment of a hog.

Mr. Smith was aware prior to the alleged incident that Mr. Bouchet did not care for him and did not want him to work in the area supervised by Mr. Bouchet. Mr. Smith had previously complained to the human resources department about comments Mr. Bouchet had made to this effect.

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).

There is insufficient evidence in the record to establish that Mr. Smith hit a hog to hurt it in violation of the employer's policy and U.S.D.A. regulations. The employer had the ability to present testimony through the person who allegedly observed the conduct, but the employer elected not to present such evidence. The employer failed to present sufficient evidence, and sufficiently direct and satisfactory evidence, to rebut Mr. Smith's testimony that he did not hit the hog to hurt it and his assertion that Mr. Bouchet may have had other reasons for wanting him removed from his position.

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

DECISION:

The Agency representative's April 9, 2012, 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