

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM D BAKUONY
Claimant

APPEAL NO. 07A-UI-03744-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 03/04/07 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

William Bakuony filed a timely appeal from the April 5, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on May 14, 2007. Mr. Bakuony participated personally and was represented by Attorney Mary Hamilton. Will Sager, Complex Human Resources Manager, represented the employer and presented additional testimony through Orv Molan, Plant Manager. Nuer-English interpreter Joseph Malual assisted with the hearing. The hearing in this matter was consolidated with the hearing in appeal number 07A-UI-03745-JTT. At the request of the employer, the administrative law judge took official notice of the administrative file generated in connection with the fact-finding interview. Both parties were provided with a copy of the administrative file prior to the hearing.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies him for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Bakuony is from Sudan and his primary language is Nuer. Mr. Bakuony was employed by Tyson Fresh Meats in Storm Lake as a full-time, second shift, production worker on the cut floor from October 4, 2005 until March 3, 2007, when the employer suspended him. The employer subsequently discharged Mr. Bakuony on March 6, 2007. Mr. Bakuony's immediate supervisor was Efrain Rojas. A week after Mr. Bakuony commenced the employment; he suffered an injury to his right hand in the course of the employment. As a result of the injury, Mr. Bakuony had a permanent medical restriction that prevented him from using a meat hook in his right hand. Mr. Bakuony continued to lack full use of his right hand. At the hearing, Plant Manager Orv Molan professed general ignorance of Mr. Bakuony's medical condition resulting from the workplace injury and expressed that such information was "confidential."

The final incident that prompted the suspension and discharge occurred on March 3, 2007 and involved an instance of purported insubordination. In the four weeks prior to March 3, Mr. Bakuony had been assigned to operate a scribe saw on the production floor. In order to

earn that assignment as a permanent assignment, or "own the job," Mr. Bakuony first had to "qualify" for the assignment. Once Mr. Bakuony "owned the job," he would be entitled to the wage assigned to that particular position. To "qualify" for the assignment, Mr. Bakuony had to master production quantity and quality expectations. During Mr. Bakuony's time in the scribe saw assignment, a trainer or "blue hat" spent approximately 20 to 30 minutes each day monitoring and documenting Mr. Bakuony's progress towards mastering the assignment. Mr. Bakuony progressed to a 95 percent production level and was performing work of average quality. As Mr. Bakuony's production quantity neared 100 percent, the quality of Mr. Bakuony's work decreased and Mr. Bakuony required hourly breaks to rest his injured hand. Mr. Bakuony believed his performance had "qualified" him for the scribe saw assignment.

Mr. Bakuony was upset on March 3, when trainer Rafael Medina instructed him to leave the scribe saw area and go work in the ham hanging area. New hires generally began their training in the ham hanging area. Mr. Bakuony had been employed at the Storm Lake plant approximately 17 months. The work in the ham hanging area involved placing hog legs on moving hooks. The ham hanging work did not require use of a meat hook, but would require Mr. Bakuony to manipulate the hog legs onto the hooks using his right hand. When Mr. Bakuony did not comply with Mr. Medina's instruction to join him in the ham hanging area, supervisor Efrain Rojas issued the same instruction. Mr. Bakuony advised Mr. Rojas that he had been assigned to the scribe saw area and that the scribe saw work was his job. Mr. Rojas told Mr. Bakuony that he was "disqualified" for the scribe saw assignment. When Mr. Bakuony continued to not comply with the directive that he move to the ham hanging area, Ms. Jimenes directed Mr. Bakuony to the cafeteria.

Mr. Bakuony then met with Plant Superintendent Orv Molan and Ms. Jimenes. During the meeting, Mr. Bakuony expressed to Mr. Molan that during more than a year of employment he had been moved too much to "qualify" for any assignment. When Mr. Bakuony told Mr. Molan that he had been in the scribe saw assignment for two weeks or more, Mr. Molan said that he would expect a person in that assignment for that period to have "qualified" by that point. Mr. Molan told Mr. Bakuony that he would defer to Mr. Rojas and Ms. Jimenes on the this issue of whether Mr. Bakuony had "qualified" for the scribe saw assignment. Mr. Molan and/or Ms. Jimenes then told Mr. Bakuony that the employer had the right to reassign him as needed, given that he did not "own a job." Mr. Bakuony protested that he would never "qualify" for an assignment or "own a job" if the employer kept moving him. Mr. Bakuony insisted that the employer assign a trainer to him so that he could be assured of "qualifying" for an assignment. The employer refused and indicated that the trainers were there primarily to assist new hires. Mr. Molan concluded that Mr. Bakuony was being argumentative. Mr. Molan had decided that Mr. Bakuony would not be "qualified" for the scribe saw. Mr. Molan told Mr. Bakuony his only choice was to go to work as directed or sit in the cafeteria. Mr. Bakuony agreed to go to work.

A short while later, Ms. Jimenes again directed Mr. Bakuony to the cafeteria. Once at new work area, Mr. Bakuony had presented the supervisor with a card containing his medical restriction(s) and asserted that the ham hanging assignment fell outside his restrictions. During the second meeting with Mr. Molan, Ms. Jimenes asserted that Mr. Bakuony was not following the directions of the trainer or supervisor. The parties had a discussion that was essentially a repeat of the earlier discussion. Mr. Molan then suspended Mr. Bakuony and instructed him to return on Monday, March 5 for another meeting. Mr. Bakuony appeared for the meeting on March 5 and was suspended until the next day, at which time the employer discharged him, purportedly for insubordination.

In January 2007, Mr. Molan had counseled Mr. Bakuony for refusing to perform a work assignment. Mr. Bakuony was concerned the assignment would hurt his right hand.

Mr. Bakuony subsequently agreed to perform the work assignment. The assignment the employer had wanted Mr. Bakuony to perform, and the assignment Mr. Bakuony agreed to perform, was the same scribe saw assignment from which the employer removed Mr. Bakuony on March 3.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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). In Gilliam, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task that was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee the basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee.

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 evidence in the record calls into question the reasonableness of the employer's decision to “disqualify” and remove Mr. Bakuony from the scribe saw assignment. The evidence indicates that Mr. Bakuony was able to perform at a 95 percent production level and perform average quality work at that production level. It was only when Mr. Bakuony was working at a full production level that the quality of his work diminished. The evidence indicates that this decrease in the quality of Mr. Bakuony's work was attributable to the impairment caused by the workplace injury. The evidence indicates that Mr. Bakuony had suffered a workplace injury and experienced a permanent disability that the employer had an obligation to reasonably accommodate. See Sierra v Employment Appeal Board, 508 N.W.2d 719 (Iowa 1993), citing Foods, Inc. v Civil Rights Commission, 318 N.W.2d 162 (Iowa 1982). The administrative law judge concludes that Mr. Molan's purported ignorance of Mr. Bakuony's medical condition is at least suspect and most likely disingenuous. The greater weight of the evidence indicates that the employer's “qualification” requirements, coupled with Mr. Bakuony's disability, essentially excluded Mr. Bakuony from “qualifying” and/or “owning a job.” Based on the facts in this case, the administrative law judge concludes that Mr. Bakuony's refusal to move to a new position without additional assistance and/or support from a trainer was reasonable. Accordingly, insubordination and misconduct are not established.

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

DECISION:

The claims representative's April 5, 2007, 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/pjs