

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RUBEN TERCERO

Claimant

APPEAL NO: 12A-UI-09952-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 07/22/12

Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Swift Pork Company (employer) appealed an unemployment insurance decision dated August 10, 2012, reference 01, which held that Ruben Tercero (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 10, 2012 but could not be completed. The hearing was concluded in person at the Iowa Workforce office in Des Moines, Iowa on November 7, 2012. The claimant participated in the hearing with Attorney Phil Miller. Interpreter Bernard Ortiz was present with the claimant but did not participate. The employer participated through Javier Sanchez, Assistant Human Resources Manager. Interpreter Patricia Vargas participated in the telephone hearing but interpreter Anna Pottebaum participated at the in-person hearing. Diana Throgmartin and Marcella Dominguez, character witnesses for the claimant, were present for the in-person hearing but did not participate. Employer's Exhibit One and Claimant's Exhibits A through C were admitted 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:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time production worker from March 28, 2011 through July 17, 2012. He was discharged for what the employer termed as job abandonment. The claimant's supervisors reported that the claimant was missing from work during his shifts on both July 11 and 13, 2012. The supervisors did not participate in the hearing and no information was provided as to exactly when the claimant was missing. He denies being away from the work site and did clock in and out each day. There was no evidence as to any previous disciplinary warnings.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

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 to prove the discharged employee is disqualified for benefits due to work-related misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on July 17, 2012 for job abandonment. The employer witness was not personally involved but testified the discharge should have been documented as a falsification of time records. The claimant denies being missing from the work site and he clocked in and out of work both days. The employer failed to provide first-hand witnesses and/or detailed evidence as to when the claimant was purportedly missing from work. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer has not met its burden. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated August 10, 2012, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs