

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

OSORIO, CESAR, A
Claimant

APPEAL NO. 12A-UI-05373-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CARGILL MEAT SOLUTIONS
CORPORATION**
Employer

**OC: 04/08/12
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 April 30, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 31, 2012. Claimant Cesar Osorio participated. The employer was aware of the hearing date and time, but did not name a representative for the hearing or provide a telephone number at which the employer could be contacted at the time the hearing. Spanish-English interpreter Ike Rocha assisted with the hearing.

The hearing notice was mailed to the parties on May 14, 2012. The employer's representative of record is Barnett & Associates. The employer and the employer representative received appropriate and timely notice of the hearing set for May 31, 2012 at 11:00 a.m. On the afternoon of Friday, May 25, 2012, the Appeals Section received a faxed request for postponement from Nick Diprimo, Hearings Coordinator for Barnett Associates. The postponement request indicated that the employer's first-hand witness would be out of town the week of May 29, 2012 to June 1, 2012. The postponement request did not name the witness, did not state why the witness would be out of town, did not state whether the witness would be available by telephone while the witness was out of town, and did not state whether some other substitute witness might be able to provide the same information at the hearing. It is noteworthy that the request came on the Friday afternoon before the extended Memorial Day weekend.

On the next business day, which was Tuesday May 29, 2012, the administrative law judge received the postponement request. Given the lack of information contained in the postponement request and the fact that the hearing was to be an interpreted hearing with a non-English speaking claimant, the administrative law judge deemed it necessary to further investigate whether there was in fact good cause to postpone the hearing.

On May 29, the administrative law judge attempted to contact Mr. Diprimo to further discuss the postponement request. The administrative law judge had to leave a voicemail message for Mr. Diprimo at the number provided on the postponement request document. The administrative law judge indicated in the message that the administrative law judge would need to hear from Mr. Diprimo to discuss the request for postponement. The administrative law judge indicated that the postponement request would not be granted unless Mr. Diprimo made contact with the

administrative law judge and provided additional information to establish good cause to move the hearing. As of the time of the hearing on May 31, 2012, the administrative law judge had heard nothing further from the employer or the employer's representative of record. In the absence of demonstrated good cause to postpone the hearing, the hearing went forward without 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: The claimant is a non-English speaking person. The claimant was employed by Cargill Meat Solutions Corporation as a full-time fork lift operator from 2008 until April 9, 2012, when the employer discharged him for allegedly leaving early on April 6, 2012 without authorization. The claimant asserts he had been given permission to leave work on the day in question.

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 failed to participate in the hearing and thereby failed to present any evidence to establish either a voluntary quit or a discharge for misconduct in connection with the employment. The evidence in the record establishes a single instance when the claimant left work early. The employer has failed to present evidence to rebut the claimant's assertions that he left with permission of a supervisor. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to the claimant.

DECISION:

The Agency representative's April 30, 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/pjs

