

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

DYLAN SCHUMACHER
Claimant

APPEAL NO. 19A-UI-02123-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 01/27/19
Claimant: Respondent (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct
Iowa Code Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 27, 2019, reference 01, decision that held the claimant was eligible for benefits provided he met all other eligibility requirements and the employer's account could be charged for benefits, based on the Benefits Bureau deputy's conclusion that the claimant was discharged on January 31, 2019 for no disqualifying reason. After due notice was issued, a hearing was held on March 27, 2019. Claimant Dylan Schumacher participated. Vicki Cervantes represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 4 and 8 through 13 into evidence. The administrative law judge took official notice of the Benefits Bureau deputy's notes created in connection with the February 26, 2019 fact-finding interview.

ISSUES:

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

Whether the claimant was overpaid unemployment insurance benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Dylan Schumacher was employed by Swift Pork Company, also known as JBS, as a full-time mechanic from 2017 until January 31, 2019, when the employer discharged him from the employment for safety violations. Mr. Schumacher's shift was 2:45 p.m. to 11:15 p.m. Mr. Schumacher's work week included Monday through Friday and alternating Saturdays. Ken Gerard, Maintenance Supervisor, was Mr. Schumacher's immediate supervisor.

The final incident that triggered the discharge occurred on January 26, 2019. On that day, some of Mr. Schumacher's maintenance coworkers were absent and Mr. Schumacher was assigned to perform more work than usual. The additional work included assisting line production workers with changing the blades of Whizard power knives the production workers used to perform their hog processing work. During the shift, Mr. Schumacher was summoned

three times to respond to a particular production worker's complaint that the production worker's Whizard power knife was not sharp enough and would not work to cut skin from hogs on the production line. Mr. Schumacher changed the blade of the Whizard knife. Mr. Schumacher wore the appropriate mechanic's personal protective gear to change the blade. Upon the third trip to address the production worker's Whizard knife issues, Mr. Schumacher was frustrated and felt the need to demonstrate to the production worker that that Whizard knife was indeed sharp enough to perform the assigned work. Mr. Schumacher was again wearing the personal protective equipment required for changing the Whizard knife blade. However, Mr. Schumacher was not wearing the additional personal protective equipment the employer's safety rules required production workers to wear to protect themselves from injury while operating the Whizard power knife in performance of the hog processing work. Mr. Schumacher had received relevant and appropriate safety training. Mr. Schumacher made two or three cuts with the Whizard knife before a production superintendent intervened and made him stop operating the Whizard knife. The production superintendent then escorted Mr. Schumacher to a meet with Mr. Girard and Assistant Human Resources Manager Sergio Lopez regarding the safety violation. At the end of that meeting, the employer suspended Mr. Schumacher pending further investigation of the matter. Mr. Lopez subsequently notified Mr. Schumacher that he was discharged from the employment.

In making the decision to discharge Mr. Schumacher from the employment, the employer considered a lock-out/tag-out safety violation that occurred on November 5, 2018. On that day, Mr. Schumacher suffered injury to his finger when he slipped and a spinning fan blade on a machine caught his finger. Mr. Schumacher had failed to follow the lock-out/tag-out protocol in connection with working on the machine. Mr. Schumacher had received appropriate training regarding the lock-out/tag-out protocol. Mr. Schumacher was fully aware that the production supervisor's directive to fix the machine was not a directive to disregard the lock-out/tag-out safety protocol. The employer issued a written warning in response to the safety violation. Mr. Schumacher's conduct in connection with the November 2018 incident and the January 2019 incident violated the employer's cardinal rules for safety. Mr. Schumacher was aware that violating a cardinal rule of safety could lead to discipline up to and including discharge from the employment.

Mr. Schumacher established an original claim for unemployment insurance benefits that was effective January 27, 2019 and received \$4,232.00 in benefits for eight weeks between January 27, 2019 and March 23, 2019. Swift Pork Company/JBS is a base period employer in connection with the claim for benefits.

On February 26, 2019, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed Mr. Schumacher's separation from the employment. Vicky Cervantes, Swift/JBS Human Resources Manager, represented the employer at the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 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).

The weight of the evidence in the record establishes a discharge for misconduct in connection with the employment. The evidence establishes two instances in which Mr. Schumacher knowingly violated the employer's safety protocol. The first safety violation in November 2018 led to injury and a reprimand. The second violation could have led to serious injury. Mr. Schumacher's workload and frustration did not justify the January 26, 2019 safety violation. Mr. Schumacher knew the difference between the personal protective equipment (PPE) required to change the Whizard knife blade and the additional PPE required to operate the Whizard power knife on the production line. Mr. Schumacher's decision to operate the Whizard knife was outside the established protocol, unreasonable, and unsafe. Mr. Schumacher could have had the production worker test the Whizard knife in his presence to ensure the knife was working satisfactorily or could have taken other reasonable steps to avoid exposing himself to potentially serious injury and exposing the employer to potential liability. Mr. Schumacher's

repeated decision to ignore the employer's safety protocol demonstrated a substantial disregard for the interests of the employer.

Because the evidence establishes a discharge based on misconduct in connection with the employment, Mr. Schumacher is disqualified for benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. Mr. Schumacher must meet all other eligibility requirements.

The unemployment insurance law requires that benefits be recovered from a claimant who receives benefits and is later deemed ineligible benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the base period employer failed to participate in the initial proceeding, the base period employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

Mr. Schumacher received \$4,232.00 in benefits for eight weeks between January 27, 2019 and March 23, 2019, but this decision disqualifies him for those benefits. Accordingly, the benefits Mr. Schumacher received constitute an overpayment of benefits. Because the employer participated in the fact-finding interview, Mr. Schumacher is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

DECISION:

The February 27, 2019, reference 01, decision is reversed. The claimant was discharged on January 31, 2019 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and been paid wages for insured work equal to 10 times his weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$4,232.00 in benefits for eight weeks between January 27, 2019 and March 23, 2019. The claimant must repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs