

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN T NELSON SR
Claimant

APPEAL NO. 16A-UI-05450-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWAN PACKING INC
Employer

**OC: 04/17/16
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

John Nelson filed a timely appeal from the May 6, 2016, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Nelson had been discharged for excessive unexcused absenteeism and tardiness after being warned. After due notice was issued, a hearing was held on May 27, 2016. Mr. Nelson participated. Kathy Bockheim represented the employer and presented additional testimony through Nori Murillo, Nong Luong and Donald Brown. Exhibits A and Two 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: John Nelson, Sr., was employed by Swan Packing, Inc., as a full-time shipping and receiving worker from 2012 until April 18, 2016, when the employer discharged him for attendance. If Mr. Nelson needed to be absent or late, the employer's policy required that he telephone his supervisor at least 30 minutes prior to his 5:00 a.m. start time. Mr. Nelson was aware of the policy. In March 2016, Mr. Nelson was tardy for personal reasons on 12 occasions.

On April 6, 2016, Mr. Nelson telephoned the workplace at 5:05 a.m. and spoke to supervisor Nori Murillo. Mr. Nelson indicated that he had taken some medication between 4:00 a.m. and 4:30 a.m., was not feeling well and would be late. Mr. Nelson then did not appear or make further contact with the employer regarding his need to be gone for the entire shift.

On April 8, 2016, Mr. Nelson was tardy for personal reasons and arrived almost two hours late for work. In connection with that late arrival, Non Luong, Quality Assurance Supervisor issued a written reprimand to Mr. Nelson and told him that the next absence would lead to suspension. In November 2015, Mr. Luong had issued a written reprimand to Mr. Nelson for attendance and had warned him that the next absence would lead to discharge from the employment.

Mr. Luong told Mr. Nelson that his attendance needed to improve immediately. Mr. Nelson knew on April 8, 2016 that the employment was in jeopardy due to his attendance.

On April 15, 2016, Mr. Nelson contacted the workplace at 5:05 a.m. and spoke to supervisor Nori Murillo. Mr. Nelson said that he was going to be late getting to work and that his supervisor could get ahold of him if he had questions. Mr. Nelson made no mention during that phone call of having attempted to reach the employer since 4:30 a.m. and made no mention of needing to be absent due to problems with his back. Though Mr. Nelson said he was going to be late, he then never reported for work that day or made no additional contact with the employer to indicate a need to be absent for the entire day. The April 15 absence triggered the discharge. The employer deemed both the proposed late arrival and the failure to appear for work at all after giving notice of a late arrival a separation violation of the attendance policy.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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). 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 evidence in the record establishes a pattern of unexcused tardiness that included 12 such instances in March 2016. The pattern followed a final warning for attendance in November 2015. The pattern in March was followed by three more absences in April 2016. The absence on April 6 was due to illness, but was reported late as a need to be late for work. Mr. Nelson then missed the entire shift without giving notice that he would be gone for the entire shift. The absence was an unexcused absence under the applicable law based on the late notice of the tardiness and that lack of notice to the employer regarding the need to be absent for the entire shift. The April 8, 2016 tardiness for personal reasons and was, therefore, an unexcused absence. The April 15, 2016 absence initially involved late notice of a need to be late, but then became another instance in which Mr. Nelson missed the entire shift without giving notice to the employer of his need to miss the entire shift. That absence also was an unexcused absence under the applicable law. The pattern just for March and April was sufficient to establish excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Nelson was discharged for misconduct. Accordingly, Mr. Nelson is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount. Mr. Nelson must meet all other eligibility requirements. The employer's account shall not be charged for benefits.

DECISION:

The May 6, 2016, reference 01, decision is affirmed. The claimant was discharged on April 18, 2016 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance, provided he meets all other eligibility requirements.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs