

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD L STRICKLER
Claimant

APPEAL NO. 12A-UI-00205-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 12/04/11
Claimant: Respondent (2-R)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 30, 2011, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 6, 2012. Claimant Richard Strickler participated personally and was represented by Attorney Karin Ziegler. Aureliano Diaz represented the employer and presented additional testimony through Terry Forbes and Donnie Box. Exhibits One 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: Richard Strickland was employed by Swift Pork Company also known as JBS, as a full-time production worker from 2008 until November 29, 2011, when Aureliano Diaz, Human Resources Manager, discharged him from the employment for making threatening remarks. Mr. Strickler worked in the stick pen and his job was to use a double-edged six or seven inch knife to sever the jugular vein of hogs to bleed them out as the hogs moved past him in the production process. The hogs had already been killed prior to arriving at the stick pen.

On November 18, Mr. Strickler was upset because he believed a salt mist was blowing at him that should not be blowing at him. The salt mist was intended to mix with pig blood on the kill floor to prevent the blood from coagulating. Mr. Strickler believed for three months that someone was intentionally redirecting air flow in his work area so that salt mist was directed at him while he worked. On November 18, Mr. Strickler called over Kill Floor Supervisor Terry Forbes to discuss the problem. Mr. Forbes investigated, but could find no issue with the air flow. Mr. Strickler was angry and told Mr. Forbes, "This is going to end badly for somebody." Mr. Forbes felt threatened by the comment and reported it to another supervisor, who brought it to the attention of Mr. Diaz. That same day, Mr. Strickler complained to maintenance worker Austin Reed about the salt mist and told Mr. Reed that he was "going to stick someone in the neck." Mr. Reed had complained to his supervisor, who directed him to report the incident to the

human resources department. Mr. Diaz interviewed Mr. Forbes, Mr. Reed and Mr. Strickler. Mr. Strickler confirmed he had made the comments attributed to him, but that he did not mean anything by them. In response to these two incidents and another from October 27, Mr. Diaz notified Mr. Strickler on November 18 that he was suspended indefinitely while the employer decided what to do about his employment.

On November 28, the employer scheduled an appointment with Mr. Strickler for the next day. On November 29, Mr. Diaz met with Mr. Strickler and discharged him from the employment.

On October 27, Mr. Strickler had again been upset about the salt mist blowing on him and complained to Donnie Box, Kill Floor Wet End Supervisor. Mr. Box investigated and did not find a problem with the air flow. Mr. Box returned to tell Mr. Strickler that everything was okay. Mr. Strickler was working in the stick pen area. Mr. Strickler punched a dead pig hard several times in the belly with both fists. Mr. Box told him to stop. Mr. Strickler was about to go on break and to go visit the nurse about the salt mist. Mr. Box summoned another worker to replace Mr. Strickler for those purposes. Mr. Strickler kept asking Mr. Box to step up into his stick pin station. Mr. Box was afraid to do that based on Mr. Strickler's anger, his ready access to a knife, and the violence he directed at the dead pig. Mr. Strickler then yelled at Mr. Box not to stare at him. Mr. Diaz met with Mr. Strickler and issued a reprimand in connection with the incident.

The employer had a written misconduct policy that prohibited threatening or intimidating other employees. Mr. Strickler was aware of the policy and had received a copy of the policy at the start of his employment.

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).

Threats of violence in the workplace constitute misconduct that disqualifies a claimant for benefits. The employer need not wait until the employee acts upon the threat. See Henecke v. Iowa Dept. Of Job Services, 533 N.W.2d 573 (Iowa App. 1995).

Regardless of the frustration Mr. Strickler felt about the salt mist issue, that did not excuse or justify the threats he made in the workplace. The weight of the evidence indicates that Mr. Strickler acted in a threatening manner on October 27, when repeatedly punched a dead hog in Mr. Box's presence. Mr. Strickler's conduct on that day placed Mr. Strickler that he would be harmed by Mr. Strickler if he got closer to Mr. Strickler's work area. Mr. Strickler followed up the threatening conduct from October 27 with two separate overt threats on November 18. Mr. Strickler admits he told Mr. Reed that he was going to stick someone in the neck. Mr. Strickler followed up that threat with the statement to Mr. Forbes that, “This is going to end badly for somebody.” Mr. Strickler asserts that he did not include the “for somebody” in his utterance. The weight of the evidence indicates he did. The weight of the evidence indicates that Mr. Strickler intended to utter serious threats and that the employer accurately perceived his comments as serious threats.

The evidence indicates that the employer had enough information to establish misconduct as of time of the suspension. The evidence indicates that notice to Mr. Strickler that he was suspended indefinitely while the employer considered what to do with his employment was sufficient to place him on notice that his employment was in jeopardy. Mr. Strickler represented a serious threat to the workplace. Under the circumstances, it was not unreasonable for the employer to allow a short cooling off period before the employer delivered the news that Mr. Strickler was indeed discharged from the employment. The evidence establishes a current

act of misconduct. Mr. Strickler is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times he weekly benefit amount, provided he is otherwise eligible. The employer's account will not be charged for benefits paid to Mr. Strickler.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's December 30, 2011, reference 01, decision is reversed. The claimant was discharged for misconduct in connection with the employment. The claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times he weekly benefit amount, provided he is otherwise eligible. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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