

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ANTHONY U OCHOA
Claimant

APPEAL NO. 18A-UI-01499-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VERSCHOOR MEATS INC
Employer

OC: 01/07/18
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Anthony Ochoa filed a timely appeal from the January 30, 2018, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the Benefit Bureau deputy's conclusion that Mr. Ochoa was discharged on January 11, 2018 for violation of a known company rule. After due notice was issued, a hearing was held on February 28, 2018. Mr. Ochoa participated. Randy Hansen represented the employer and presented additional testimony through Brett Benson.

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: Verschoor Meats, Inc. is a slaughterhouse. Anthony Ochoa was employed by Verschoor Meats, Inc. as a full-time hog production laborer from February 2016 until January 11, 2018, when business owners Randy Hansen and Mike Benson discharged him from the employment for smoking marijuana. Mr. Ochoa worked primarily in the "slow room" of the employer's barn. The slow room measures approximately 10 feet by 20 feet. Mr. Ochoa's duties involved using a gun-like device to shoot or "knock" a large bolt into the hog's forehead. Mr. Ochoa would then hose off the stunned hog in the "shower room" and put the hog on a conveyer that would transport the hog to the kill floor. Mr. Ochoa's work was inherently dangerous, given the regular use of a firearm and the size and unpredictability of the hogs. Mr. Ochoa worked alongside Dilbert Winter. Brett Benson, Barn Supervisor, was their immediate supervisor.

During the shift on January 11, 2018, Mr. Benson detected the odor of marijuana as he entered the barn facility in the course of performing his regular duties. Mr. Benson investigated to determine the source of the odor. When Mr. Ochoa approached the slow room, he raised the overhead garage door to the slow room. Mr. Benson immediately smelled a strong odor of burnt marijuana and saw marijuana smoke wafting in the air. Mr. Benson saw Mr. Ochoa and Mr. Winter were the only two employees present in the slow room. As Mr. Benson entered,

Mr. Ochoa darted into the shower room in a feeble attempt to avoid being caught. Mr. Benson had Mr. Ochoa re-enter the slow room. Mr. Benson asked the pair whether they had been smoking marijuana. After some hesitation, Mr. Ochoa and Mr. Winter each admitted they had been smoking marijuana. When Mr. Benson asked whether other employees had been smoking marijuana with the pair, Mr. Ochoa and Mr. Winter became silent and uncooperative. Mr. Benson escorted the pair to Randy Hansen's office. In addition to be a co-owner of the business, Mr. Hansen functions as the plant manager and human resources manager. Mr. Benson notified Mr. Hansen that he had caught Mr. Ochoa and Mr. Winter smoking marijuana in the barn. Mr. Hansen had co-owner Mike Benson join the conversation. While all were gathered for the meeting, Mr. Hansen asked Mr. Ochoa and Mr. Winter whether they had been smoking marijuana. Mr. Ochoa and Mr. Winter each again admitted that they had been smoking marijuana. The employer then discharged Mr. Ochoa and Mr. Winter from the employment. This incident was the sole basis for the discharge.

The employer provided Mr. Ochoa with a handbook at the start of his employment. The handbook contained a policy that possession of drugs on company property was an "Immediately dischargeable offense." The employer does not have a drug testing policy and did not request that Mr. Ochoa submit to a drug test. Nor did Mr. Ochoa offer to submit to a drug test.

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). 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 weight of the evidence in the record establishes misconduct in connection with the employment. Mr. Ochoa did indeed smoke marijuana on the employer's property and during his work hours on January 11, 2018. Though Mr. Benson did not arrive in time, or did not enter quickly enough or stealthily enough, to catch Mr. Ochoa with the substance at his lips, the intense smell, the wafting smoke and Mr. Ochoa's attempt to dart out of the room clearly indicated that Mr. Ochoa had indeed just been smoking marijuana. Mr. Ochoa and Mr. Winter each admitted the marijuana use at the time Mr. Benson confronted them in the slow room. Mr. Ochoa again admitted the marijuana use when questioned about Mr. Hansen during the meeting in Mr. Hansen's office. During the appeal hearing, Mr. Ochoa conceded that he had made the admission while in Mr. Hansen's office. During the hearing, Mr. Ochoa unpersuasively attempted to excuse away his admission by asserting essentially that he felt bulldozed by the employer. The evidence indicates otherwise. Mr. Ochoa knowingly and intentionally engaged in criminal conduct that also violated the employer's work rules. Mr. Ochoa made an inherently dangerous job substantially more dangerous by imbibing an intoxicating substance. Mr. Ochoa's conduct demonstrated an intentional and substantial disregard of the employer's interests.

Because Mr. Ochoa was discharged for misconduct in connection with the employment, Mr. Ochoa 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. Ochoa must meet all other eligibility requirements. The employer's account shall not be charged.

DECISION:

The January 30, 2018, reference 01, decision is affirmed. The claimant was discharged on January 11, 2018 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 ten times his weekly benefit amount. The claimant must meet all other eligibility requirements. The employer's account shall not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/rvs