

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CORY D KOESTNER
Claimant

APPEAL NO. 14A-UI-09544-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AG PROCESSING INC A COOPERATIVE
Employer

OC: 08/17/14
Claimant: Appellant (1)

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

STATEMENT OF THE CASE:

Cory Koestner filed a timely appeal from the September 5, 2014, reference 01, decision that disqualified him for benefits. After due notice was issued, a hearing was held on October 3, 2014. Mr. Koestner participated personally and was represented by attorney Brad McIntyre. Thomas Kuiper of Equifax Workforce Solutions represented the employer and presented testimony through John Dugger and Mike Rolo. The administrative law judge took official notice of the fact-finding materials and labeled those materials as Department Exhibits D-1 through D 14.

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: Cory Koestner was employed by Ag Processing Inc. as a full-time material handler from 2012 until July 22, 2014, when the employer discharged him for a pattern of careless and/or negligence performance of his work duties. Mr. Koestner's duties involved unloading soybean oil from trucks and railcars. The work involved climbing up onto large transportation vessels. The employer had an established safety protocol that included use of personal protective equipment such as a body safety harness and a lifeline lanyard to prevent falls. Mr. Koestner had received appropriate training in using the personal protective equipment and was familiar with the safety protocol. On two instances in July 2014, Mr. Koestner left the lanyard attached to the ladder on a truck that he had just finished unloading, instead of attaching the lanyard to the safety pole as called for under the safety protocol, and allowed the truck to drive off. In one instance, the ladder on the side of the truck was pulled from the truck as the truck drove away. In the other instance, the lifeline lanyard snapped. The two incidents occurred on July 10 and July 22. The discharge followed the second incident.

In making the decision to discharge Mr. Koestner from the employment, the employer considered an earlier incident from April 2014, wherein Mr. Koestner performed work on top of a commercial truck trailer without wearing his personal protective equipment. Mr. Koestner had decided not to collect his personal protective equipment from where it was stored. Mr. Koestner's failure to collect the PPE placed him at increased risk of a fall from 10 to 12 feet off the ground.

In making the decision to discharge Mr. Koestner, the employer also considered three additional incidents of negligence in March through June of 2013. In one of the incidents, Mr. Koestner failed to properly document the unloading work he had performed and then misplaced important paperwork. In another incident, Mr. Koestner failed to assure he had sufficient room to get through a doorway with a forklift and collided with an overhead door that he had not opened high enough. In another, less serious incident, Mr. Koestner failed to perform an assigned duty in the timeframe the employer thought reasonable.

The employer counseled and/or reprimanded Mr. Koestner in connection with the incidents that factored in the discharge.

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 carelessness and/or negligence sufficient to indicate a willful disregard of the employer's interests. The three final incidents were sufficient to establish such a pattern. The 2013 incidents just add to the pattern. The final incident in July followed just 12 days after an almost identical earlier incident. In April, Mr. Koestner had placed himself at risk by failing to wear the PPE while he performed elevated work. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Koestner was discharged for misconduct. Accordingly, Mr. Koestner is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits.

DECISION:

The claims deputy's September 5, 2014, reference 01, decision is affirmed. The claimant was discharged for misconduct. 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 allowance, provided he meets all other eligibility requirements. The employer's account will not be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs