IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

RIGOBERTO ARGUETA AGUILAR
Claimant

SWIFT & COMPANY
Employer

APPEAL NO. 08A-UI-03231-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/17/08 R: 03
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the March 28, 2008, reference 03, decision that denied benefits. After due notice was issued, a hearing was held on April 29, 2008, in Des Moines, Iowa. Claimant participated through interpreter Angela Arellano. Employer participated through Tony Luce. Employer's Exhibits 1 and 2 were received. Claimant's Exhibit A was received.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time production worker from January 8, 2007 through February 7, 2008, when he was discharged for alleged destruction of company property and alleged violation of knife handling procedures. On February 1 he used an electric wizard knife (Employer's Exhibit 1) that shook or vibrated and would not always cut. He told line supervisor, Sergio Tellez, who said he could not do anything and instructed him to keep working. Claimant tried to adjust the knife by loosening or tightening the screws, but that did not work. He also tried to lubricate it by pushing a button but it was not flowing, so he tapped it on the conveyor belt. As he continued cutting a shank bone, the knife became stuck and was not cutting; so as he pulled the knife out of the frozen meat, the knife flew off and the handle and broke in pieces in his hand. (Employer's Exhibit 1-C) There was no way to visually determine if there was stress to the metal or a crack in the metal under the blue sleeve of the handle before it broke. He stopped the line at the controls behind his back so he could find the pieces of blade metal and remove them from the product. Ten minutes later Tellez and another supervisor, Alfredo Rico, appeared to ask why he stopped the line. They did not ask if he was injured or if the knife hurt him but took him to the office, where he wrote a statement and was suspended. In summary, claimant wrote that when he began to work with the knife, the knife shook strongly a lot and that there were times it would slide and did not cut. He had to let some legs go by on the conveyor belt and tried to adjust the screws but the knife would tighten up and would not move. Suddenly, when he pulled the knife from the bone, the knife flew off and he was left with the piece in his hand. There was no mention of hitting anything. (Claimant's Exhibit A)

Benjamin Reyes, Pedro Cardenas, Gerald Harmon, and Jose Armenta were working in the area. Reyes worked across the conveyor belt from claimant but product passed at eye level between them. He made a statement in Spanish that was translated to English and was said to have claimed claimant was angry but he was not available to cross-examine about what made him think that, since claimant had just returned from vacation and was not feeling stressed. Nor was he available to question about his use or meaning of the words "hit" or "strike" in the context of the knife placement against the conveyor belt. The closest witness was Harmon and the others; while working about two meters away, they would have been blocked by machinery and would have been too busy working to see what he was doing. While claimant had undergone orientation about proper knife handling and destruction of company property, for which employer has zero tolerance, there had been no warnings or allegations of similar issues. There were regular issues with wizard knife maintenance and the metal part of the knife was known to heat up if the cable that spins the knife did not work. It was normal to tap or shake the knife to get the grease to flow, but claimant did not say he "beat" it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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.

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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of

unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. IDHS*, 461 N.W.2d 603, 607 (Iowa App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608.

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Regardless of employer's "zero tolerance" policy, since it had not previously warned claimant about any of the issues leading to the separation and there is no credible evidence he acted deliberately. Claimant acted reasonably by reporting the knife malfunction to his supervisor and continuing to work as instructed. Since Reyes was not available for direct or cross-examination, there were crucial questions about his statement that went unanswered and claimant's testimony is considered credible. Employer has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The March 28, 2008, reference 03, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending February 23, 2008 shall be paid to claimant forthwith.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw