

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DANIEL PESINA

Claimant

APPEAL NO. 13A-UI-02945-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 01/06/13

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 27, 2013, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 9, 2013. Claimant participated. Xavier Sanchez represented the employer. Exhibits One, Two, and Three 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: Daniel Pesina was employed by Swift Pork Company, JBS, as a full-time distribution center maintenance worker from August 2012 until January 11, 2013, when the employer discharged him for alleged insubordination and alleged refusal to wear personal protective equipment. The incident that triggered the discharge occurred on January 4, 2013. On that day, Mr. Pesina was assisting with the repair of a piece of equipment. The work took place in a cold area. The work was rigorous and resulted in Mr. Pesina perspiring. Because Mr. Pesina was perspiring in a cold area, his perspiration resulted in his safety goggles becoming fogged up. In order to see, Mr. Pesina had to periodically remove the safety goggles to clean the lenses.

At one point when Mr. Pesina had momentarily removed his safety glasses to clean them, Tim McGrew, General Manager, was in the work area and took Mr. Pesina to task for not wearing his safety glasses at all times. Mr. Pesina attempted to explain the problem with the safety glasses fogging up. Mr. McGrew did not want to hear the explanation. Instead, Mr. McGrew took a heavy-handed approach and chastised Mr. Pesina for not wearing safety glasses at all times. Mr. Pesina's further attempts to explain the problem he was having with the safety glasses only served to further irritate Mr. McGrew. At no point did Mr. Pesina refuse to wear safety glasses or any other personal protective equipment. Mr. Pesina did mention that he had lost an earplug in the course of moving quickly between two levels to get the piece of equipment up and running again. Mr. McGrew brought Mr. Pesina's supervisor, Charles Viles, and other

supervisors into the conversation. Mr. McGrew then turned the conversation to suggest that Mr. Viles had been letting Mr. Pesina get away with unspecified workplace infractions. The employer issued a written reprimand on January 4, 2013. The employer then followed with a discharge on January 11 for alleged insubordination in connection with the January 4 discussion.

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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

In Gilliam v. Atlantic Bottling Company, the Iowa Court of Appeals upheld a discharge for misconduct and disqualification for benefits where the claimant had been repeatedly instructed over the course of more than a month to perform a specific task and was part of his assigned duties. The employer reminded the claimant on several occasions to perform the task. The employee refused to perform the task on two separate occasions. On both occasions, the employer discussed with the employee a basis for his refusal. The employer waited until after the employee's second refusal, when the employee still neglected to perform the assigned task, and then discharged employee. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990).

The weight of the evidence in the record fails to establish either a willful violation of the employer's protocol or insubordination in connection with the events of January 4, 2013. While the employer reasonably expected Mr. Pesina to wear appropriate safety gear, Mr. Pesina reasonably concluded it was important for him to be able to see, even if that meant taking off the safety goggles from time to time to clean off the condensation. The evidence establishes that Mr. Pesina was careless in failing to keep his ear protection in his ears. The evidence does not establish either a pattern of negligence. The evidence does not establish any refusal to wear protective gear.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Pesina was discharged for no disqualifying reason. Accordingly, Mr. Pesina is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Pesina.

DECISION:

The Agency representative's February 27, 2013, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css