

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN P JOHNSTON
Claimant

APPEAL NO. 15A-UI-13978-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

RELCO LOCOMOTIVES INC
Employer

OC: 11/15/15
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

John Johnston filed a timely appeal from the December 8, 2015, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on an Agency conclusion that Mr. Johnston was discharged on November 19, 2015 for insubordination. After due notice was issued, a hearing was held on January 11, 2016. Mr. Johnston participated. Debra Pettit represented the employer and presented testimony through Chelsea Bachman. Exhibits One through Four and A 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.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John Johnston was employed by Relco Locomotives, Inc., as a full-time fabricator from 2010 until November 19, 2015, when the employer discharged him for allegedly creating an unsafe work environment, for alleged insubordination, and for alleged use of profanity. Mr. Johnston's primary duties involved welding and grinding locomotive parts.

The final incident that triggered the discharge occurred on November 18, 2015. On that day, Mr. Johnston was assigned to perform his regular duties. In addition, a supervisor assigned Mr. Johnston to clean up a particular area of the employer's facility that had become cluttered with various objects. The employer alleges that Mr. Johnston threw a box of nuts, bolts and brackets on the floor. Mr. Johnston did not throw anything on the floor. Rather, Mr. Johnston brushed some of the clutter off of a work space that he needed to use to perform his primary work duties. The employer alleges that Mr. Johnston refused to clean up the work space. Mr. Johnston did indeed perform substantial cleaning in the area before he returned to his primary duties and did not refuse any directives. The employer alleges that Mr. Johnston told a supervisor, "I will do whatever the fuck I want." The employer alleges that the utterance

occurred when Mr. Johnston was in a break area. Mr. Johnston had gone to the break area to wash rust out of his eyes. While in the vicinity, Mr. Johnston saw that a piece of an appliance was lying on the floor and made reference to the item. Mr. Johnston did not make the comment later attributed to him.

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 employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct in connection with any of the events alleged to have occurred on November 18, 2015. The employer had the ability to present testimony from persons who allegedly witnessed the events, but the employer elected not to present such testimony. The employer failed to present sufficient evidence to rebut Mr. Johnston's testimony regarding the matters in question. Because the evidence fails to establish a current act of misconduct, the administrative law judge concludes that Mr. Johnston was discharged for no disqualifying reason. Accordingly, Mr. Johnston is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The December 8, 2015, reference 01, decision is reversed. 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/pjs