IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

YONAS M SEYOUM
Claimant

SWIFT PORK COMPANY
Employer

APPEAL NO. 17A-UI-01622-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/08/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Yonas Seyoum (claimant) appealed a representative's February 9, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Swift Pork Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 3, 2017. The claimant participated personally through Birhanu Gessese, Interpreter. The employer participated by Kristy Knapp, Human Resources/Family Medical Leave Act Coordinator.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on December 7, 2015, as a full-time production worker. The claimant signed for receipt of the employer's handbook on December 8, 2015. The handbook states that it is a major violation for an employee with a work-related injury to seek further outside medical treatment without prior notice to the employer. The employer issued the claimant a written warning on July 20, 2016, for accumulating some attendance points.

The claimant suffered a work-related injury to his left hand and had two surgeries. The company doctor told him that if the hand swelled, he should go to the emergency room. The claimant's hand started to swell. He called the workers compensation company and the company doctor and left a number of messages. No one returned his calls. After three days of swelling he went to the emergency room on January 4, 2017.

On January 4, 2017, he went to work with a doctor's note from the emergency room visit. The employer told him to sit and wait for two and a half hours before they would speak with him. The employer issued the claimant a written warning for seeking outside medical treatment without the employer's permission. The employer yelled at the claimant and used profanity. The claimant raised his voice to explain himself and asked the employer why the employer was

using that sort of language. He asked the employer what was happening. The employer issued the claimant a warning for insubordination.

The employer told the claimant to return to his regular work even though he had restrictions from the emergency room. There were no further incidents. On January 9, 2017, the employer terminated the claimant for being insubordinate on January 4, 2017.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer had the power to present testimony but chose to provide a statement regarding the incident of January 4, 2017. The statement does not carry as much weight as live testimony because the testimony is under oath and the witness can be questioned. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct.

The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The employer issued the claimant a warning for insubordination. A warning tells the employee that if this should happen again, there will be consequences. The employer did not provide any other incident of misconduct after the warning was issued. It was not able to provide any evidence of a final incident of misconduct The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's February 9, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs