

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROGER L JACOBSEN
Claimant

APPEAL NO. 08A-UI-08542-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SUPERIOR MIDWEST FOODS LLC
Employer

OC: 02/03/08 R: 01
Claimant: Appellant (4)

Iowa Code section 96.4(3) – Able & Available
Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the September 19, 2008, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on October 23, 2008. Claimant participated personally and was represented by attorney Marcus Gross. Rod Pendgraft, Plant Manager, represented the employer and presented additional testimony through Manny Cardoza, Assistant Plant Manager, and Betty Larson, Office Manager/Human Resources Associate. The hearing in this matter was consolidated with the hearing in Appeal Number 08A-UI-08543-JTT. The administrative law judge took official notice of the Agency's administrative record of wages reported by the claimant and benefits disbursed to the claimant.

ISSUE:

Whether the claimant has met the able to work and available for work requirements of Iowa Code section 96.4(3) since he established his claim for unemployment insurance benefits.

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: Roger Jacobsen was employed by Superior Midwest Foods as general laborer from February 11, 2008 until September 18, 2008, when Plant Manager Rod Pendgraft discharged him. Immediately prior to this employment, Mr. Jacobson had worked full-time at the same facility for the previous owner for a period exceeding 20 years. At the beginning of the new employment, Mr. Jacobson worked full-time hours. During May 2008, the employer reduced Mr. Jacobson's hours to 14 to 16 hours per week due to a lack of work orders. In connection with the reduction in work hours, Mr. Jacobson applied for and received unemployment insurance benefits for the two-week period of May 4, 2008 through May 17, 2008.

During the latter half of May 2008, Mr. Jacobson notified the employer that he needed to be off work for foot surgery and that he expected to be unable to work for six weeks while he recovered from the foot surgery. The employer approved the request for a medical leave of absence with an

unspecified return to work date. Mr. Jacobson maintained appropriate contact with the employer during the leave.

At the beginning of July, Mr. Jacobson's doctor released him to return to work with a 20-pound lifting restriction. Mr. Jacobson's regular duties did not require him to lift more than 20 pounds. Mr. Jacobson presented his medical release and restrictions to the employer in a timely fashion. The employer was unwilling to allow Mr. Jacobson to return to work without a full medical release. At the time of that conversation, the employer and Mr. Jacobson had a brief discussion about whether unemployment insurance benefits might be available to Mr. Jacobson. Effective July 13, 2008, Mr. Jacobson reopened his claim for unemployment insurance benefits. Mr. Jacobson received weekly unemployment insurance benefits of \$277.00 for the period of July 13, 2008 through August 16, 2008.

On August 16, 2008, Mr. Jacobson's doctor released him to return to work without restrictions. Mr. Jacobson provided the employer with the medical release in a timely fashion and returned to work on August 18. On his first day back at work, Mr. Jacobson suffered a workplace injury to his left arm. Mr. Jacobson and the employer initially concluded that the injury did not require medical attention. On Sunday, August 24, 2008, Mr. Jacobson went to the emergency room due to pain and swelling in his injured arm. The emergency room staff referred Mr. Jacobson to his family doctor. Mr. Jacobson saw his doctor on August 25. The doctor diagnosed a deep tissue bruise. The doctor released Mr. Jacobson to return to work with a 20-pound lifting restriction applicable to his left arm. Mr. Jacobson provided the employer with documentation of the medical restriction and returned to his regular duties.

Mr. Jacobson continued his claim for unemployment insurance benefits for partial unemployment after he returned to the employment on August 18. For the weeks ending August 23 and August 30, Mr. Jacobson reported wages that exceeded his weekly benefit amount and received no unemployment insurance benefits. For the week ending August 30, Mr. Jacobson had worked 32.5 hours. For the week that ended September 6, 2008, the employer only had two days of work for Mr. Jacobson. Mr. Jacobson reported \$117.00 in wages to Workforce Development and received \$229.00 in benefits. For the week that ended September 13, 2008, Mr. Jacobson reported wages of \$225.00 and received \$121.00 in unemployment insurance benefits. During the week that ended September 13, Mr. Jacobson had worked 40 hours.

For the week that ended September 20, 2008, Mr. Jacobsen worked 26.5 hours before the employer discharged him. Mr. Jacobsen reported \$234.00 in wages and received no benefits based on the Workforce Development representative's conclusion that Mr. Jacobsen did not satisfy the requirements of Iowa Code section 96.4(3) for that week.

On September 18, Mr. Jacobsen and the employer participated in an unemployment insurance fact-finding interview with a Workforce Development representative. After the fact-finding interview, Mr. Jacobsen reported to the workplace to start work. Plant Manager Rod Pendgraft and Assistant Plant Manager Manny Cardoza were waiting for Mr. Jacobsen at the door. Mr. Pendgraft told Mr. Jacobsen that he was discharged from the employment, but did not provide a reason. The employer now indicates that the Mr. Jacobsen was discharged because he was unable to keep up with the production line.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge will first address the issues of Mr. Jacobsen's ability to work, availability for work, and whether Mr. Jacobsen was partially unemployed prior to the September 18, 2008 separation from the employment.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.

a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b). An individual shall be deemed temporarily unemployed if the individual is

unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).

The evidence in the record indicates that Mr. Jacobsen was in fact partially unemployed during the two-week period of May 4 through 17, 2008, when the employer significantly cut his work hours due to low work orders. Mr. Jacobsen was eligible for unemployment insurance benefits during those two weeks, provided he was otherwise eligible.

The evidence indicates that Mr. Jacobsen was temporarily unemployed during the period of July 13 through August 26, 2008. The evidence indicates that Mr. Jacobsen had been released to work with a 20-pound lifting restriction. The evidence indicates that Mr. Jacobsen was physically able to perform his regular duties during this period without violating the lifting restriction. The evidence indicates the employer decided not to allow Mr. Jacobsen to return to work without a full release. The weight of the evidence indicates that Mr. Jacobsen met the work ability requirements of Iowa Code section 96.4(3) during the period in question and made himself available to the employer. Where an employer fails to reemploy a worker after an approved leave of absence, the worker is deemed laid off. 871 IAC 24.22(2)(j). The evidence indicates that Mr. Jacobsen was temporarily laid off during the period of July 13 through August 26, 2008. Mr. Jacobsen was eligible for benefits for the period of July 13, 2008 through August 26, 2008, provided he was otherwise eligible.

The evidence indicates that Mr. Jacobsen was reemployed on a full-time, or near full-time basis, from August 18 through August 30, 2008. For those two weeks Mr. Jacobsen reported wages that exceeded his weekly benefit amount and did not receive any unemployment insurance benefits. Because Mr. Jacobsen was working on a full-time basis, he would not be deemed "available" under Iowa Code section 96.4(3) and would not be eligible for benefits during August 18 through August 30, 2008. See 871 IAC 24.23(23).

The evidence indicates that during the week that ended September 6, 2008, the employer made only two days of work available to Mr. Jacobsen and that Mr. Jacobsen was once again partially unemployed. Mr. Jacobsen was eligible for benefits for the week that ended September 6, 2008, provided he was otherwise eligible.

The evidence indicates that for the week that ended September 13, 2008, Mr. Jacobsen was employed on a full-time basis. Because Mr. Jacobsen was working full-time, he did not meet the work availability requirements of Iowa Code section 97.4(3) and was not eligible for the \$121.00 in benefits he received for the week ending September 13, 2008.

The evidence indicates that for the week that ended September 20, 2008, the employer only made 26.5 hours of work available to Mr. Jacobsen before the employer discharged Mr. Jacobsen from the employment. Mr. Jacobsen was partially unemployed for that week and was eligible for benefits, provided he was otherwise eligible.

The evidence indicates that Mr. Jacobsen has been able to work and available for work since he separated from the employment. Accordingly, Mr. Jacobsen would be eligible for benefits, provided he is otherwise eligible.

The administrative law judge will now address the separation from the employment and the question of whether the separation disqualifies Mr. Jacobsen for unemployment insurance benefits.

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).

The weight of the evidence in the record indicates that Mr. Jacobsen was not discharged for misconduct. Regardless of whether the employer discharged Mr. Jacobsen because he had applied

for unemployment insurance benefits or whether the employer discharged Mr. Jacobsen because was incapable of keeping up with the production line, the evidence fails to establish misconduct on the part of Mr. Jacobsen. Mere failure to perform to the satisfaction of the employer does not constitute misconduct. See 871 IAC 24.32(1)(a). The September 18, 2008 separation from the employment did not disqualify Mr. Jacobsen for benefits. Mr. Jacobsen would be eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Jacobsen.

The \$121.00 overpayment of benefits for the week ending September 13, 2008 will be addressed in the companion case. See Appeal Number 08A-UI-08543-JTT.

DECISION:

The Agency representative's September 19, 2008, reference 02, decision is modified as follows. The claimant was partially unemployed during the two-week period of May 4 through 17, 2008, and was eligible for unemployment insurance benefits during those two weeks, provided he was otherwise eligible. The claimant was temporarily unemployed during the period of July 13 through August 26, 2008 and was eligible for benefits for that period, provided he was otherwise eligible. The claimant did not meet the availability requirements of Iowa Code section 96.4(3) during the two-week period of August 18 through August 30, 2008 and was not available for benefits for that period. The claimant was once partially unemployed for the week that ended September 6, 2008, and was eligible for benefits, provided he was otherwise eligible. For the week that ended September 13, 2008, the claimant did not meet the availability requirements of Iowa Code section 96.4(3) and was not eligible for benefits. For the week that ended September 20, 2008, the claimant was partially unemployed and was eligible for benefits, provided he was otherwise eligible. The claimant has continued to be able to work and available for work since the September 18, 2008, separation and is eligible for benefits, provided he is otherwise eligible.

The claimant was discharged on September 18, 2008, for no disqualifying reason and is eligible for benefits, provided he is otherwise eligible.

The employer's account may be charged for benefits paid to the claimant during the employment and after the separation.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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