

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARY C DIENG
Claimant

APPEAL NO. 10A-UI-14553-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 02/14/10
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the October 13, 2010, reference 08, decision that allowed benefits in connection with an August 28, 2010 separation. After due notice was issued, a hearing was held on December 9, 2010. The claimant participated. Jenny Mora represented the employer and presented additional testimony through Clifton Howell. Nuer-English interpreter James Tuolual assisted with the hearing. The administrative law judge took official notice of the March 16, 2010, reference 04, decision that allowed benefits in connection with a February 3, 2010 separation from the same employer and that found the employer's protests untimely, along with the administrative law judge decision in Appeal Number 10A-UI-04268-CT, which affirmed the lower decision. The administrative law judge also took official notice of the July 8, 2010, reference 07, decision that allowed benefits in connection with a June 16, 2010 separation from the same employer.

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: The claimant was most recently employed by Swift & Company/JBS as a full-time production worker from June 23, 2010 until August 28, 2010, when the employer discharged the claimant for insubordination. The claimant's immediate supervisor was Clifton Howell, Casing Supervisor. The claimant is a non-native English speaker with limited English skills. Claimant's native language is Nuer, an African language. On the claimant's final day in the employment, Mr. Howell directed the claimant to perform production duties at the "fecal stand." Though this was not the claimant's usual job assignment, the claimant had performed these duties for three or four days leading up to the last day of the employment. These duties were easier than the claimant's usual work assignment. On the last day of the employment, when Mr. Howell directed the claimant to perform the fecal stand duties, the claimant notified Mr. Howell that she did not want to perform the fecal stand duties because they were not part of her usual job duties. When Mr. Howell again directed the claimant to report to the fecal stand workstation and the claimant

refused, Mr. Howell directed the claimant to go to the office. Shortly thereafter, the employer discharged the claimant from the employment for alleged insubordination. The claimant had at no other time refused to follow an employer directive during the most recent period of employment.

The claimant had previously worked for the employer and separated from the employment on February 3, 2010. The claimant established a claim for benefits that was effective February 14, 2010. On March 16, 2010, a Workforce Development representative entered a reference 04 decision that allowed benefits in connection with the February 3, 2010 separation and concluded that the employer's protest could not be considered because it was not timely. The employer appealed that decision. The decision was affirmed by Administrative Law Judge Carolyn Coleman in Appeal Number 10A-UI-04268-CT. The employer did not appeal Judge Coleman's decision and it became a final Agency decision. After the February 3, 2010 separation, the claimant returned to the employment in April 2010 and was employed until she was discharged on June 16, 2010. The claimant established an additional claim for benefits. On July 8, 2010, a Workforce Development representative entered a reference 07 decision that allowed benefits and that concluded the claimant had been discharged for no disqualifying reason. The employer did not appeal that decision and it became a final Agency decision. The claimant again became employed with the employer on June 23, 2010 and it is the claimant's separation from this most recent period of employment that is the focus of the present appeal matter.

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).

The weight of the evidence in the record establishes that on August 28, 2010, the employer issued a reasonable directive that the claimant report to the same workstation she had worked at for the preceding three or four days. The claimant unreasonably refused to report to workstation, solely because it was not her regular workstation. The claimant, by her own testimony, indicates she did not have a good reason for not reporting to the fecal stand workstation, since it was easier than the work she was normally assigned to perform. Thus, the evidence establishes a single incident of the claimant unreasonably failing to follow a reasonable employer directive. The evidence does not establish a pattern of unreasonable refusal to follow reasonable employer directives such as is required to establish misconduct in connection with the employment that would disqualify the claimant for unemployment insurance benefits.

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

DECISION:

The Agency representative's October 13, 2010, reference 08, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw