

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WILLIAM R TIERNAN
Claimant

APPEAL NO. 12A-UI-11339-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY
Employer

OC: 08/19/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 11, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on October 16, 2012. Claimant William Tiernan participated. Javier Sanchez, human resources assistant manager, represented the employer.

ISSUE:

Whether Mr. Tiernan separated from the employment for a reason that disqualifies him for unemployment insurance benefits. The administrative law judge concludes that Mr. Tiernan was discharged from the employment on August 20, 2012 for reasonably refusing the employer's unreasonable, last-minute directive that he work late on August 17, 2012. The administrative law judge concludes the refusal did not constitute misconduct or job abandonment.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: William Tiernan was employed by Swift Pork Company, also known as JBS, as a full-time, first-shift boiler and engineering room mechanic from 1996 until August 20, 2012, when the employer's human resources staff discharged him from the employment for alleged job abandonment. Mr. Tiernan's immediate supervisor was Cody Summers, boiler and engineering room supervisor.

Throughout his employment, the employer usually had Mr. Tiernan working seven days a week, with only the occasional day off. Mr. Tiernan's regular work hours were 6:00 a.m. to 2:30 p.m., Sunday through Saturday.

On Friday, August 17, 2012, Mr. Tiernan started work at 6:00 a.m. and left work at his scheduled 2:30 p.m. quit time. Shortly after 2:00 p.m., Mr. Summers told Mr. Tiernan he would have to stay and work four additional hours because another employee was drunk and could not work. Mr. Tiernan needed to get his spouse to a medical appointment that afternoon and refused to stay beyond the scheduled end of his shift. On Sunday, August 19, 2012, Mr. Tiernan called in an absence for personal reasons. On Monday, August 20, an hour into Mr. Tiernan's shift, the employer summoned him to the human resources office and told him he was being discharged for job abandonment based on the refusal to stay and work extra hours on August 17, 2012. The employer cited no additional reason for ending the employment.

REASONING AND CONCLUSIONS OF LAW:

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The evidence fails to support the allegation that Mr. Tiernan voluntarily quit. At no point did Mr. Tiernan announce an intent to sever the employment relationship. Mr. Tiernan's decision to leave work at the end of his scheduled shift on August 17, 2012 did not signal a voluntary quit or job abandonment. The evidence indicates instead that the employer discharged Mr. Tiernan, a 17-year, seven-day-a-week employee, on August 20, 2012 based on an single incident of him refusing a last-minute request that he stay late.

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 discharge boils down to a discharge for alleged insubordination.

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 employer's directive that Mr. Tiernan stay four extra hours was unreasonable under the circumstances. The directive was made last-minute, when Mr. Tiernan, a seven-day-a-week employee, was nearing the end of his shift. For these same reasons, Mr. Tiernan's refusal to comply with the request was reasonable. Mr. Tiernan had worked his shift and had other pressing matters to attend to. Mr. Tiernan's refusal did not constitute misconduct. Mr. Tiernan was discharged for no disqualifying reason. Accordingly, Mr. Tiernan is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The Agency representative's September 11, 2012, 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/kjw