

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

EDMUNDO ORTIZ ALVARADO
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 21A-UI-18156-DH-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 05/23/21
Claimant: Appellant (2)**

Iowa Code § 96.2(A) - Discharge for Misconduct
Iowa Code § 96.5(1) - Voluntary Quit
Iowa Admin. Code r. 871-24.32(8) - Current Act

STATEMENT OF THE CASE:

The claimant/appellant, Edmundo Ortiz Alvarado, filed an appeal on August 17, 2021 from the August 17, 2021, (reference 03) unemployment insurance decision that concluded he was not eligible for unemployment insurance benefits due to her discharge on May 6, 2021 for excessive unexcused absences. Notices of hearing were mailed to the parties' last known addresses of record for a telephone hearing scheduled for October 8, 2021. The claimant participated. Spanish interpretation was provided only briefly by Riana (#104282) who then disappeared and then Ernie provided interpretation, both with CTS, account #9958. The employer was not registered and did not participate. No exhibits were offered. Judicial notice was taken of the administrative file.

ISSUE:

Was the separation a layoff, discharge for misconduct or voluntary quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having heard the testimony and reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a third shift maintenance person, starting sometime in December of 2004, and his last day worked was May 25, 2021, when he was discharged for too many abscesses. Claimant knew the employer had policies regarding coming to work and generally aware that if you are going to miss work, one calls in at least thirty minutes before. Claimant was not provided with and employee handbook/company policies. Claimant had no prior action/warning/talks/discipline regarding attendance. Claimant was not aware his job was in jeopardy.

Employer offers no testimony, exhibits or evidence for this hearing.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment, but for no disqualifying reason and therefore benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. The employer failed to establish they made claimant aware her position was in jeopardy about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.


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.

Employer has failed to meet their burden of proof to establish: a last event happened; the event warranted termination; that claimant was aware his job was in jeopardy; what the policy claimant is alleged to have violated; and that claimant received a copy of the policy. While employer may have had a good reason to terminate claimant, there was not a disqualifying reason and no disqualification pursuant to Iowa Code § 96.5(2)a is imposed.

DECISION:

The August 17, 2021, (reference 03) unemployment insurance decision is **REVERSED**. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.



Darrin T. Hamilton
Administrative Law Judge

October 13, 2021
Decision Dated and Mailed

dh/mh