

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

J P C MCCLUNG
Claimant

APPEAL NO. 17A-UI-08607-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

JOHN MORRELL & CO
Employer

OC: 07/30/17
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

J. P. McClung filed a timely appeal from the August 15, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. McClung was discharged for misconduct on July 18, 2017 for conduct not in the best interest of the employer. After due notice was issued, a hearing was held on September 8, 2017. Mr. McClung participated. Thomas Kuiper of Equifax represented the employer and presented testimony through Derek Rude. The hearing in this matter was consolidated with the hearing in Appeal Number 17A-UI-08608-JTT, concerning the same parties. Exhibit A was received into evidence.

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: J. P. McClung was employed by John Morrell & Company, a/k/a Armour Eckrich Meats, L.L.C., a/k/a Smithfield Foods, as a full-time machine operator from 2013 until July 28, 2017, when Jacque Huesman, Human Resources Manager, discharged him for theft of time. Mr. McClung's immediate supervisor was Production Supervisor Curtis Zwit. Mr. McClung's work hours were 2:30 p.m. to 1:00 a.m., Monday through Friday. Mr. McClung's hourly wage was \$18.40.

The sole incident that factored in the discharge occurred on July 10, 2017. At the beginning of the shift, Mr. McClung participated in a staff meeting run by Mr. Zwit. After the meeting, Mr. Zwit and other production workers returned to the production floor on a lower level of the plant. Mr. McClung did not return to the production floor at that time. Mr. McClung received an upsetting telephone call from his mother. Mr. McClung's mother was distraught during the call. Mr. McClung's mother had called Mr. McClung to let him know that his aunt, the mother's sister, Teresa Cole, had recently passed away following a heroin overdose. Mr. McClung's mother

had just learned of her sister's death. Mr. McClung did not feel that he could break away from the call with his mother in such an upset state. Mr. McClung was himself in a very upset state and concedes that he was not thinking rationally. Mr. McClung made his way to the men's locker room and remained there and on the phone with his mother until about two and a half hours later, when Mr. Zwit located him in the locker room on the phone and crying. Mr. McClung explained his circumstances to Mr. Zwit. Mr. Zwit directed Mr. McClung to report to Ms. Huesman's office. Mr. McClung terminated the call and reported to the human resource manager's office as directed. Ms. Huesman sent Mr. Zwit home for the remainder of the day.

When Mr. McClung returned to work the following day, Ms. Huesman suspended him from the employment and encouraged Mr. McClung to produce an obituary, funeral program or other proof that his aunt had indeed passed away. Mr. McClung made a good faith effort to obtain the proof the employer required, but was unable to produce such evidence of his aunt's passing. Mr. McClung and his mother reside in Mason City. Mr. McClung's aunt and other extended family lived in Chicago. Mr. McClung and his mother are estranged from the family members in Chicago. When Ms. McClung failed to produce evidence of his aunt's passing, Ms. Huesman mailed a termination letter to Mr. McClung on July 28, 2017.

REASONING AND CONCLUSIONS OF LAW:

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.

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).

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 establishes a legitimate employer concern, but not misconduct in connection with the employment. The weight of the evidence establishes that Mr. McClung needed to immediately respond to a bona fide emergency during his shift on July 10, 2017. While a rational individual might have handled the employment relationship better than Mr. McClung did that day, Mr. McClung's absence from his work station and the purported theft of time arose from a good faith error in judgment under extenuating circumstances, not from an intentional and substantial disregard of the employer's interests. Mr. McClung provided candid and credible testimony regarding his good faith effort to obtain the proof the employer demanded and why he was unable to satisfy that demand.

The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct by a preponderance of the evidence. The employer elected not to have Ms. Huesman or Mr. Zwit testify at the hearing. The employer had requested that the hearing be postponed to accommodate Ms. Huesman's and Mr. Zwit's vacation. The employer provided minimal details regarding the vacation-based postponement request and the administrative law judge denied the request for lack of good cause shown and the inherent prejudice to the claimant involved in delaying the hearing. The employer had the ability to present testimony from Mr. Zwit and/or Ms. Huesman and elected not to present such testimony.

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

DECISION:

The August 15, 2017, reference 01, decision is reversed. The claimant was discharged on August 28, 2017 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/rvs