

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

JIM M MONTGOMERY

Claimant

APPEAL 17A-UI-08187-JP-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 07/02/17

Claimant: Appellant (1)

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

Iowa Code § 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 20, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on August 30, 2017. Claimant participated. Employer participated through human resources manager Nicholas Aguirre. Employer Exhibit 1 was admitted into the record with no objection.

ISSUE:

Is the appeal timely?

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on July 20, 2017; however the unemployment insurance decision did not have "North" or "N" in his street address. Claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by July 30, 2017. The appeal was not filed until August 11, 2017, which is after the date noticed on the unemployment insurance decision. On August 11, 2017, claimant went to Iowa Workforce Development in Marshalltown, Iowa because he had not received a decision about his eligibility. While at the Marshalltown office, claimant was informed he had been denied benefits and he immediately filed an appeal.

Claimant was employed full-time as a production employee in the barn from September 21, 2015, and was separated from employment on June 30, 2017, when he was discharged. Claimant was responsible for driving a bobcat in the employer's livestock department (barn).

The employer has a written policy that prohibits improper handling of livestock. Employer Exhibit 1. The employer requires its employees that work with livestock to treat the livestock humanely.

Employer Exhibit 1. Claimant was trained on how to treat livestock humanely. Employer Exhibit 1. The employer also has a "JBS Disciplinary Action Guidance for Human Handling Violations" policy which provides that the employer will "not tolerate the mistreatment of animals at [its] facilities." Employer Exhibit 1. The policy further provides that "if animal mistreatment is observed it is every employee's responsibility to report the event to his/her supervisor." Employer Exhibit 1. Claimant was aware of the policy. The employer also defines willful acts of abuse to include "[k]nowingly allowing slow hogs to be ran over[.]" Employer Exhibit 1. The Employer also states the USDA defines willful acts of abuse to include: "Causing any unnecessary pain and suffering[.]" Employer Exhibit 1.

The final incident that resulted in discharge occurred on June 29, 2017. Employer Exhibit 1. The incident was recorded on video surveillance. Employer Exhibit 1. On June 29, 2017, during claimant's scheduled shift, claimant reversed his bobcat over a live "slow" hog in the "slow" hog pin at approximately 12:16 a.m. Employer Exhibit 1. The hog was considered a "slow" hog by the employer. Claimant passed by the "slow" hog in his bobcat to pick up a dead hog in the "slow" pin area. Claimant used the bobcat to pick up the dead hog and then he reversed his bobcat and backed over the hog he had passed. Mr. Aguirre testified that the video surveillance showed claimant's bobcat was elevated a little bit due to his backing over the hog. Claimant realized he had backed on top of the hog and he drove forward. Claimant then stopped the bobcat and looked at the hog from the cab of the bobcat. Claimant testified that the hog appeared fine. Claimant did not exit the bobcat to check on the hog he just backed over. Claimant then left the pin area. Claimant returned to the "slow" hog pin area multiple times during his shift. On occasion, claimant exited the bobcat in the pin area and forced the hog he ran over to move to a different location in the pin area. Claimant never reported the incident to the employer. Even if the hog was not injured, claimant should have reported the incident. Claimant should have contacted his supervisor or a quality control technician immediately after backing over the hog to have the hog properly checked for injuries. The employer is subject to being shut down if it is discovered that a hog was willfully harmed. Towards the end of claimant's shift, a third party vendor discovered the incident and the employer had claimant report to human resources. Mr. Aguirre was notified about the incident around 7:00 a.m. and the employer started an investigation. Mr. Aguirre interviewed claimant and claimant admitted he was aware that he ran over the "slow" hog. Claimant told the employer that the "slow" hog was still alive at 5:30 a.m. when he clocked out. Mr. Aguirre and claimant reviewed the surveillance video. When the employer reviewed the video, it saw tread marks or a gash on the hog.

The employer suspended claimant on June 29, 2017. Employer Exhibit 1. On June 30, 2017, claimant was discharged for violating the employer's policy. Employer Exhibit 1.

Claimant was last warned on April 21, 2016, for not following the employer's "human handling procedures at all times." Employer Exhibit 1. Claimant was also warned and suspended on October 23, 2015 for not following the employer's human handling procedures. Employer Exhibit 1.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsections 10 and 11, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the fact-finder's decision because the decision was not received. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Claimant filed an appeal the same day he discovered the disqualification. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct. Benefits are denied.

It is the duty of an administrative law judge and the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge, as the finder of fact, may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other evidence you believe; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

This administrative law judge assessed the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and used my own common sense and

experience. This administrative law judge reviewed the exhibit that was admitted into the record. This administrative law judge finds the employer's version of events to be more credible than claimant's recollection of those events.

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).

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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer's rules requiring employees to handle livestock humanely is reasonable. On June 29, 2017, claimant backed over a hog with his bobcat. Although claimant testified he

accidentally backed over the hog, it is clear that he was immediately aware that he backed over the hog when it happened. Even though claimant was aware he backed over the hog, he never reported the incident to the employer. Claimant's argument that he did not think he needed to report the incident to the employer because the hog appeared ok is not persuasive. The employer trained claimant on how to handle livestock humanely. Employer Exhibit 1. Mr. Aguirre credibly testified that the video surveillance showed the bobcat being elevated when claimant backed over the hog. It is reasonable to expect a hog may be injured if it is backed over by a bobcat. Claimant did not immediately get out of his bobcat to check on the hog and he only got out of his bobcat and observed the hog when he had to move the hog to a different area later in his shift. Furthermore, claimant had two prior disciplinary warnings for not following the employer's "human handling procedures at all times." Employer Exhibit 1. Claimant also testified he believed he would have been discharged if he had reported the incident.

The employer has presented substantial and credible evidence that claimant failed to adhere to the employer's humane handling procedures and he failed to immediately report to the employer that he backed over a hog after having been previously warned about following the employer's "human handling procedures at all times." Employer Exhibit 1. The employer has a duty to protect the safety of its livestock. Claimant's actions of backing over a hog with his bobcat and not reporting the incident to the employer was contrary to the best interests of the employer and the safety of its livestock. This is disqualifying misconduct. Benefits are denied.

DECISION:

The July 20, 2017, (reference 01) unemployment insurance decision is affirmed. Claimant's appeal is considered timely. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Jeremy Peterson
Administrative Law Judge

Decision Dated and Mailed

jp/rvs