

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELIZABETH DIAZ**

Claimant

**APPEAL NO. 12A-UI-13865-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**

Employer

**OC: 10/28/12**

**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Elizabeth Diaz filed a timely appeal from the November 15, 2012, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 17, 2012. Ms. Diaz participated. Will Sager, Storm Lake Complex Human Resources Manager, represented the employer. Spanish-English interpreters Ninfa Redmond and Ike Rocha assisted with the hearing.

**ISSUE:**

Whether Ms. Diaz 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: Elizabeth Diaz was employed by Tyson Fresh Meats, Inc., in Storm Lake as a full-time production worker from 2001 until October 26, 2012, when the employer discharged her for safety violations. Ms. Diaz worked in the retrim department. Ms. Diaz had to use a wizard knife, an electric rotating blade, to perform her work. The wizard knife hung overhead. When Ms. Diaz was finished using the knife, she would have to reach high and to the left to return the knife to its resting spot overhead. Ms. Diaz is of short stature. Ms. Diaz was required to wear protective gear on her right arm, the arm she used to operate the wizard knife. Ms. Diaz was required to wear a greater amount of protective gear on her left arm, the arm she used to manipulate product as she used the wizard knife with her right hand. Because of the need to return the wizard knife to a position high overhead and to the left when she was done using it, and because she had difficulty returning the knife to its resting position using her right hand, after Ms. Diaz turned the knife off, she would transfer the wizard knife from her right hand to her left hand as she was putting the wizard knife away. The other workers in Ms. Diaz's area used the same method for returning their wizard knives to their resting places. Though Ms. Diaz wore protective gear on both arms, the transfer of the knife from one hand to another left Ms. Diaz's right arm relatively exposed compared to her left arm. In mid-October, a coworker had counseled Ms. Diaz not to switch arms when putting the wizard knife away, but Ms. Diaz had responded that was the only way she could put the wizard knife away. The employer used

monthly safety meetings to reinforce that employees should not transfer the wizard knife to their other hand when putting it away. Ms. Diaz knew that she was not supposed to use her left hand to put the wizard knife away.

On October 22, 2012, a supervisor observed Ms. Diaz transferring the wizard knife from her right hand to her left hand as she was before placing the knife in its overhead resting place. Four days later, Ms. Diaz was escorted to the human resources office and discharged for having three safety violations since June 14, 2012.

In making the decision to discharge Ms. Diaz, the employer considered an incident from September 18, 2012. During production, Ms. Diaz had asked to use the restroom. A male production worker, who was taller than Ms. Diaz, came up behind Ms. Diaz and surprised her by putting his hand over hers and taking possession of the wizard knife while it was running. Ms. Diaz had relinquished possession of the knife. The employer reprimanded both for unsafe transfer of the knife. The proper protocol was to turn the knife off before transferring the knife to someone else. Ms. Diaz knew the appropriate protocol.

In making the decision to discharge Ms. Diaz, the employer considered an incident on June 14, 2012, when Ms. Diaz briefly worked on the production line without the required safety glasses. Someone fetched safety glasses for Ms. Diaz and she put them on. Ms. Diaz knew she was required to wear safety glasses on the production line.

At the time Ms. Diaz was discharged from the employment, she was in the process of addressing with the employer's nursing department gradual hearing loss that she believed was caused by the employment. The employer's follow up on that issue ended with Ms. Diaz's discharge from the employment.

## **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).

The administrative law judge notes that the employer did not present testimony from any of the supervisors involved in observing the safety violations.

The weight of the evidence in the record establishes that Ms. Diaz violated the employer's established safety procedure regarding handling of the wizard knife on October 22, 2012, when she transferred the wizard knife to her left hand before returning it to its overhead resting position. The evidence establishes that Ms. Diaz did so out of necessity because she could not otherwise reach high enough to put the wizard knife away. Ms. Diaz made certain to turn the knife off before she added the additional step to putting it away. Ms. Diaz's practice was the same as some of her coworkers who experienced similar issues with returning the knife to its resting place. The poor ergonomics of Ms. Diaz's work station related to putting the wizard knife away contributed to the safety violation and were a mitigating factor. Likewise, the male counterpart's act of coming from behind and taking the running wizard knife from Ms. Diaz was a mitigating factor in that instance. While the evidence does establish three safety violations, the administrative law judge concludes, based on the circumstances of the two final violations, that Ms. Diaz's conduct did not demonstrate a willful or wanton disregard of the employer's interests. Without discounting the need for safe practices in the workplace, the administrative law judge concludes that Ms. Diaz was discharged for no disqualifying reason. Ms. Diaz is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

**DECISION:**

The Agency representative's November 15, 2012, reference 01, decision is reversed. 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs