

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**HASSAN ZENNOUHI**  
Claimant

**APPEAL NO. 12A-UI-11489-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

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

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

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 18, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on November 26, 2012. Claimant Hassan Zennouhi participated. Javier Sanchez, Human Resources Assistant Manager, represented the employer. French-English interpreter Melissa Abraham assisted with the hearing. Exhibits One through Nine were received into evidence.

**ISSUE:**

Whether Mr. Zennouhi 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: Hassan Zennouhi is a non-native English speaker. Mr. Zennouhi does not read or write English. Mr. Zennouhi was employed by Swift Pork Company, also known as JBS, as a full-time blade changer from June 2011 until February 27, 2012, when the employer discharged him for failing to follow the lockout/tag out procedure on February 21, 2012. On February 21, Mr. Zennouhi was changing a belly skinner blade when Supervisor Cliff Howell observed that Mr. Zennouhi had placed his lock on the power supply switch, but had not *secured* the lock on the power supply switch to assure that the power equipment did not start running while Mr. Zennouhi was working on it. Mr. Zennouhi's lock also lacked a tag ID. Placement of the lock on the power supply switch without actually locking the lock was how Mr. Zennouhi had been trained to perform the lockout/tag out procedure. The purpose of the lockout/tag out procedure was to assure that Mr. Zennouhi would not be injured while working on the power equipment. In November 2011, the employer had another employee assist Mr. Zennouhi with taking a written test regarding the lockout/tag out procedure. Since that time, Mr. Zennouhi had performed the lockout/tag out procedure as demonstrated by his supervisors. Mr. Zennouhi was surprised when Mr. Howell raised concern about how Mr. Zennouhi had performed the lockout/tag out procedure and asserted he had performed the lockout/tag out procedure that day the same way he had performed it during the previous three or four months. In connection with being questioned on the matter, Mr. Zennouhi mentioned that supervisors had placed pressure on him

to perform the knife-changing duties quickly. The employer suspended Mr. Zennouhi on February 21, pending further investigation, though the investigation was done on February 21. The further delay was based on the employer's need to have its corporate office approve the discharge based on a safety issue. The employer discharged Mr. Zennouhi on February 27, 2012.

### **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 employer has presented written statements from Mr. Howell and another supervisor. The employer did not present any testimony from Mr. Howell or from anyone with firsthand knowledge concerning the training Mr. Zennouhi received on the lockout/tag out protocol. The employer presented a statement from Mr. Zennouhi that the employer had another employee write out, since Mr. Zennouhi does not write English. Mr. Zennouhi's written statement is consistent with the testimony that he provided at the appeal hearing, that he performed the lockout/tag out on February 21 the way he had been shown to perform it and the way he had been performing it for months. The weight of the evidence indicates that Mr. Zennouhi's training on lockout/tag out was defective and that Mr. Zennouhi's failure to secure his lock on February 21 was not based on a willful disregard of the employer's interests or willful disregard of the lockout/tag out protocol.

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

**DECISION:**

The Agency representative's September 18, 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.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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