

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DENIS MUHIRE
Claimant

APPEAL NO. 17A-UI-00503-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

REMBRANDT ENTERPRISES INC
Employer

OC: 12/11/16
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Denis Muhire filed a timely appeal from the January 11, 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. Muhire was discharged on December 13, 2016 for misconduct in connection with the employment. After due notice was issued, a hearing was held on February 14, 2017. Mr. Muhire participated. Pam Winkel, Human Resources Administrator, represented the employer.

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: Rembrandt Enterprises, Inc. operates an egg manufacturing plant in Rembrandt, Iowa. The company processes eggs into liquid egg product and dried egg product for human consumption. Denise Muhire was employed by Rembrandt as a full-time package draw-off operator (PDO) from 2013 until December 13, 2016, when the employer discharged him from the employment for alleged failure to perform metal detector checks and for alleged falsification of company records. The employee handbook prohibited falsification of company records and indicated that such conduct would subject the offending employee to discharge from the employment. Mr. Muhire received a copy of the handbook upon hire and was familiar with the policy prohibiting falsification of company records. Mr. Muhire's work schedule consisted of three 12-hour shifts one week and four similar shifts the next week. His work hours were 5:00 p.m. to 5:00 a.m. Mr. Muhire's immediate supervisor was Fernando Torres. Above Mr. Torres in the company hierarchy were managers Dave Hines and Vanhty Rattanavong. Mr. Torres and Mr. Rattanavong are still with the employer. Mr. Hines recently separated from the employer.

Mr. Muhire worked in the section of the plant that produced liquid egg product. Mr. Muhire was responsible for monitoring one to two computerized egg processing machines. Mr. Muhire was responsible for making periodic checks of the machines' metal detecting apparatus to ensure

the metal detecting apparatus was operating correctly. Metal detector checks were required every three hours under United States Department of Agriculture food safety regulations. The employer's written policy required metal detector checks every two hours. Mr. Torres expected the metal detector checks to be done hourly. Mr. Muhire was required to document on a tracking sheet that he had performed the metal detector checks. Mr. Muhire was aware of the written policy and Mr. Torres' expectations. It would take two to three minutes to perform the metal detector check. If the metal detector checks were not completed, or if metal was located in the finished product, the product would either have to be reworked or it would be subject to recall and expose the employer to liability.

The final incident that triggered the discharge allegedly occurred on December 9, 2016 and came to the employer's attention that same day. On that day, Mr. Torres asserted that Mr. Muhire failed to perform some of the required metal detector checks. Mr. Muhire asserted that he did indeed perform the required metal detector checks except for those for which another employee would have been responsible. Mr. Muhire asked Mr. Torres to review the surveillance camera. After this conversation, Mr. Muhire documented two metal detector checks that he had failed to document earlier in the shift. Later in the shift, Mr. Torres told Mr. Muhire that he had reviewed the surveillance camera and that the camera showed he had not performed all of the required checks. On December 13, 2016, Mr. Torres and other members of management again met with Mr. Muhire for the purpose of discharging him from the employment. While the employer witness for the appeal hearing asserts that Mr. Muhire conceded during the December 13 meeting that he had gotten confused and had not performed some of the required checks, Mr. Muhire denies that he made any such statement during the December 13 interview and asserts that he performed all duties as assigned. The employer witness, Pam Winkel, was not present for the December 13 meeting with Mr. Muhire. After the employer notified Mr. Muhire that he was discharged from the employment, the employer invited Mr. Muhire to add his comments to the termination document. Mr. Muhire there was no point in doing after the employer's decision to discharge him from the employment and did not add any comments.

The employer asserts that Mr. Muhire engaged in unspecified similar conduct on or about December 4, 2016 that also factored in the discharge.

In making the decision to discharge Mr. Muhire from the employment, the employer considered a reprimand issued to Mr. Muhire on October 28, 2016 regarding an incident from September 25, 2016. In that instance, Mr. Muhire and a coworker were responsible for performing a pre-fill inspection and post-fill inspection of a 2,500 pound bag of liquid eggs to ensure that the spout at the bottom of the container was accessible. If the spout was inaccessible, the customer would be unable to use the product. The employer asserts that Mr. Muhire and his coworker failed to do the pre-fill inspection and post-fill inspection. On October 18, after the employer received the unusable product back from the customer, a member of management spoke with Mr. Muhire about the matter. Mr. Muhire asserted he had completed the required inspections and asserted that the spout must have shifted during transport.

In making the decision to discharge Mr. Muhire from the employment, the employer considered an incident from February 2016, wherein the employer asserts that Mr. Muhire falsified weight checks on a couple items. Mr. Muhire asserts he did the weight checks, subsequently realized the scale was off, and then reported to the machine operator that the weights were off.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

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 employer has presented insufficient evidence, and insufficiently direct and satisfactory evidence to prove misconduct in connection with the employment by a preponderance of the evidence. The appeal hearing was originally set for February 3, 2017, but was postponed at the request of employer representative Lori Carr due to Pam Winkel not being available for the hearing. The hearing was rescheduled to February 14, 2017. At that time, Ms. Winkel was present and indicated that Ms. Carr was not available due to illness. The employer had not requested further postponement of the hearing. The employer elected, in connection with both hearing dates, not to present testimony from persons with personal knowledge of the incidents that factored into the discharge. Even if Ms. Carr had been available on February 14, 2017, her personal knowledge of the events that factored in the discharge was apparently limited to the discussion on December 13, 2016, at which a number of supervisors were also present. Ironically, the employer elected not to name or use Mr. Torres as a witness for the hearing, even though Mr. Torres appears to have had the most personal knowledge of the matters in question and is still with the employer. The employer also could have presented testimony through Vanhty Rattanaovong, but elected not to present such testimony. The employer witness' testimony consisted entirely of hearsay, perhaps hearsay within hearsay, and was not enough to rebut Mr. Muhire's testimony from personal knowledge that he had performed all duties as assigned.

Because the employer did not meet its burden of proving misconduct in connection with the final alleged incident or any of the prior alleged incidents, the administrative law judge concludes that Mr. Muhire was discharged for no disqualifying reason. Accordingly, Mr. Muhire is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

DECISION:

The January 11, 2017, reference 01, decision is reversed. The claimant was discharged on December 13, 2016 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