

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANJELICA W MARKS
Claimant

APPEAL NO. 14A-UI-06848-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 07/21/13
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Angelica Marks filed a timely appeal from the June 26, 2014, reference 04, decision that disqualified her for benefits. After due notice was issued, a hearing was held on July 24, 2014. Ms. Marks participated. Kristi Fox, Human Resources Clerk, 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: Anjelica Marks was employed by Tyson Fresh Meats, Inc., as a full-time production worker from July 2013 until June 10, 2014, when the employer discharged her for attendance and alleged insubordination. The final incident that triggered the discharge was an alleged incident of insubordination on June 10, 2014. Ms. Marks' duties involved spraying fecal matter off of hogs to prevent the production process from becoming contaminated. On June 6, Ms. Marks' supervisor, Travis John, told Ms. Marks that she had missed some "contamination." Mr. John then turned off the water to the hose Ms. Marks had been using to spray the water. Ms. Marks asked what was going on. Mr. John merely shook his head. Ms. Marks did not know what Mr. John's head shake meant. Ms. Marks turned the water back on to finish her work. Mr. John did not provide any more information or directives.

On May 29, a supervisor suspended Ms. Marks, for allegedly failing to perform her work appropriately. The supervisor wanted Ms. Marks to run from side to side of the hogs every two minutes as she sprayed the hogs. That had not previously been a requirement. Ms. Marks told the supervisor that she believed he was asking her to work in a dangerous manner. The supervisor said he would not put Ms. Marks in danger and Ms. Marks responded that she had just seen two hogs fall. A supervisor had previously issued a written reprimand to Ms. Marks two days earlier for the same incident that prompted the suspension.

Ms. Marks declined to sign the May written reprimands upon the advice of a union steward. Ms. Marks' signature on the reprimand would mean that she agreed with the allegations set forth on the reprimand.

A supervisor issued a written reprimand to Ms. Marks in January 2014 for allegedly failing to follow a supervisor's instructions.

The final absence that factored in the discharge occurred on June 9, 2014, when Ms. Marks was absent due to illness and properly notified the employer.

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).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See Gaborit v. Employment Appeal Board, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. Gaborit, 743 N.W.2d at 557.

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The employer presented insufficient evidence, and insufficiently direct and satisfactory evidence, to prove misconduct in connection with the employment. The employer did not provide testimony from anyone with personal knowledge of the alleged conduct that factored in the discharge. The employer had the ability to present such testimony. The evidence does not establish a single incident of Ms. Marks unreasonably refusing to follow a reasonable directive from a supervisor. Nor does the evidence establish a single unexcused absence.

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

DECISION:

The claims deputy's June 26, 2014, reference 04, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs