IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JOHN D CORDELL
2968 INDEPENDENCE APT 11
WATERLOO IA 50703

TYSON FRESH MEATS INC
C/O FRICK UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-08089-JTT
OC: 07/29/05 R: 03
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

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

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the July 29, 2005, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on August 23, 2005. John Cordell participated. Complex Human Resources Manager Dave Duncan represented the employer. Exhibit One was received into evidence. The employer represented voluntarily terminated his participation in the hearing prior to the end of the hearing. When the administrative law judge realized the employer representative was no longer participating, the administrative law judge contacted the employer and was advised that the employer representative was unavailable.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: John Cordell was employed by Tyson Fresh Meats as a full-time rendering team member from December 9, 2003 until July 7, 2005, when Plant Human Resources Manager Randy Schultz discharged him for misconduct.

The final incident that prompted the discharge occurred on June 29, 2005, when Mr. Cordell came to the plant to pick up his paycheck. Mr. Cordell was off-duty at the time and had not worked that day. Mr. Cordell had consumed alcohol earlier in the day. Instead of providing Mr. Cordell with his paycheck, Plant Human Resources Manager Randy Schultz required Mr. Cordell to submit to a breath alcohol test, which revealed a breath alcohol content which in an amount that violated the employer's drug and alcohol policy. Mr. Schultz immediately placed Mr. Cordell on an indefinite suspension, but directed him to appear for a meeting the next day at 11:00 a.m. Mr. Cordell appeared for the meeting on June 30. At that meeting, Mr. Schultz directed Mr. Cordell to appear at 3:00 p.m. on July 1 to complete a "return to duty test" pursuant to the employer's "self-rehabilitation" program. On July 1, Mr. Cordell properly notified the employer, pursuant to the employer's attendance policy, that he was ill and would be absent. Mr. Cordell was next scheduled to work on July 5 and July 6. On both dates, Mr. Cordell properly notified the employer that he was ill and would be absent. On July 7, Mr. Cordell arrived at the workplace at 3:25 p.m., at which time he was discharged for violating the employer's drug and alcohol policy.

The employer's drug and alcohol policy is posted on a bulletin board in the workplace and is reviewed with employees on an annual basis. The employer does not know whether Mr. Cordell ever reviewed the posted copy of the policy. On December 9, 2003, the date of hire, Mr. Cordell signed orientation materials that indicated he had reviewed the drug and alcohol policy. The policy provides that an employee who tests above a .04 breath alcohol concentration is in violation of the policy and subject to termination, professional rehabilitation, or "self-rehabilitation." Under the policy, an employee who refuses a "return to duty" alcohol or drug test shall be discharged.

The employer had previously been concerned with Mr. Cordell's alcohol use and had placed Mr. Cordell in its "self-rehabilitation" program in the early part of 2005. The employer subsequently subjected Mr. Cordell to a breath alcohol test on two occasions. Mr. Cordell tested negative on both occasions.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Cordell was discharged for misconduct in connection with his employment.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

Since the claimant was discharged, 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 to misconduct, a discharge her 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).

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 representative testified that Mr. Cordell was discharged for violating the employer's drug and alcohol policy. The employer did not provide a copy of the drug and alcohol policy for the hearing and did not have a copy of the policy available to read into the hearing record. The evidence in the record does not indicate whether the policy was intended

to be one authorized by Iowa Code Section 730.5. If the employer's policy was based on Iowa Code Section 730.5, the employer presented minimal evidence to demonstrate compliance with the requirements of that provision.

The employer representative testified that the employer did not consider attendance in making the decision to discharge Mr. Cordell. The employer representative was unprepared for attendance-related questions. The evidence in the record is insufficient for the administrative judge to conclude that Mr. Cordell's attendance history included any unexcused absences. See 871 IAC 24.32(7).

The employer has failed to corroborate its allegation that Mr. Cordell was discharged for misconduct. The employer had the ability to provide more direct and satisfactory evidence, but failed to provide that evidence for the hearing. Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Cordell was discharged for no disqualifying reason. Accordingly, Mr. Cordell is eligible for benefits, provided he is otherwise eligible. The employer's account may be assessed for benefits paid to Mr. Cordell.

DECISION:

The Agency representative's decision dated July 29, 2005, reference 01, 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 assessed for benefits paid to the claimant.

jt/kjw