

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARSHALL N TODD
Claimant

APPEAL NO. 17A-UI-08907-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 07/30/17
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the August 21, 2017, reference 01, decision that allowed benefits to the claimant provided he was otherwise eligible and that held the employer's account could be charged for benefits, based on the claims deputy's conclusion that the claimant was discharged on July 17, 2017 for no disqualifying reason. After due notice was issued, a hearing was held on September 19, 2017. Claimant Marshall Todd participated. Kristi Rossiter represented the employer and presented additional testimony through Gil Herber and Dave Duncan. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 9 into evidence.

ISSUES:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

Whether the employer's account may be charged.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Marshall Todd was employed by Tyson Fresh Meats, Inc. as a full-time Rendering Operator from 2015 until July 20, 2017, when Dave Duncan, Human Resources Manager, and Dean Stumma, General Rendering Foreman, discharged him from the employment for alleged dishonesty. Gil Herber, Rendering Supervisor, was Mr. Todd's immediate supervisor. Mr. Todd's scheduled work hours were 1:00 p.m. to 9:30 p.m., Monday through Friday. Mr. Todd's work duties included operating machinery, clean up duties, and operating a forklift and Bobcat skid loader to move hogs and production chemicals.

The final incident that triggered the discharge occurred on July 17, 2017. As Mr. Todd was using a Bobcat to retrieve bulk chemicals from an outside storage room, when he backed into a pallet and knocked over a 55-gallon barrel of Pedox, a non-toxic preservative the employer uses in bone meal production. Ms. Todd was not aware at the time he had knocked over the barrel, but subsequently noted a spill on the ground. Mr. Todd was not aware that he had caused the

spill. Mr. Todd rolled the leaking barrel over to stop it from leaking on the ground. Mr. Todd was aware that the employer's established procedure for address chemical spills required him to report the spill to the supply personnel and to his supervisor. Mr. Todd went to a supply office, told the supply personnel that he had located a chemical spill and asked for assistance in lifting the barrel to an upright position. At the time, Mr. Todd had a 15-pounding lifting restriction. Mr. Todd also requested shrink wrap so that he could secure the other three barrels on the pallet that had contained in the spilled barrel. Mr. Todd then reported the leaking barrel to Mr. Stumma and Mr. Herber. Mr. Herber asked Mr. Todd if he had caused the leak. Mr. Todd told Mr. Herber and Mr. Stumma that he was not sure whether he spilled the barrel, but that it was either him or the supply staff who had caused the spill. After Mr. Todd reported the spill, the employer commenced an investigation of the matter. The employer determined that the leaked substance was Pedox and did not pose an environmental hazard. The employer reviewed surveillance video of the supply storage area, which video showed Mr. Todd backing into the pallet of barrels and knocking the barrels over.

After Mr. Todd finished moving chemicals into the plant for production, the employer summoned Mr. Todd to a meeting with several managers present. Dave Duncan, Human Resources Manager, asked Mr. Todd whether he had told Mr. Stumma and Mr. Herber that he did not spill the chemical. Mr. Todd told Mr. Duncan that is not what he had said to Mr. Stumma and Mr. Herber and that he had instead told them that he *did not think* he had spilled the chemical, but did not know. Mr. Duncan then had Mr. Todd watch a five-minute portion of the surveillance record that showed Mr. Todd knocking over the barrel of Pedox while operating the Bobcat. Mr. Duncan again asked Mr. Todd whether he had spilled the chemical. Mr. Todd then conceded that he must have knocked over the barrel. Mr. Todd told Mr. Duncan that he had not earlier believed that he had had spilled the chemical. Mr. Duncan asked Mr. Todd whether he had reported the spill. Mr. Todd told Mr. Duncan that he had reported the spill to the supply staff. Mr. Duncan then suspended Mr. Todd pending further investigation of the matter. On July 18, Mr. Duncan spoke with the supply staff. The discharge followed on July 19, 2017. The cost of the spilled Pedox was \$900.00. The cost of having an outside vendor clean up the spill was \$400.00.

In making the decision to discharge Mr. Todd from the employment, the employer considered prior conduct on the part of Mr. Todd and associated reprimands. The next most recent incident that factored in the discharge occurred in March 2017. At that time, Mr. Todd did not complete a Bobcat inspection form because the supply staff was out of the forms. The supply staff provided Mr. Todd with a substitute form that Mr. Todd completed to obtain the key to the Bobcat from the supply staff. In August 2016, Mr. Todd committed a lock-out/tag-out violation. Mr. Todd raised the forks.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 evidence fails to establish misconduct in connection with the final incident that triggered the discharge. The employer presented insufficient evidence to prove, by a preponderance of the evidence, that Mr. Todd was intentionally dishonest with Mr. Herber and Mr. Stumma when he reported the chemical spill to them on July 17. The July 19, 2017, disciplinary action form, Exhibit 2, erroneously states that Mr. Todd did not report the spill to his supervisor or anyone else. The employer had the ability to present a surveillance video record of the spill incident, but did not present the surveillance video record as evidence. The fact that a birds-eye view of

the spill shows Mr. Todd causing the spill is not proof that Mr. Todd was aware that he had caused the spill at the time it occurred. Mr. Todd was in immediate contact with the supply staff following the spill. The employer had the ability to present testimony from the supply staff concerning that contact, but did not present such testimony. The employer's assertion of misconduct centers on Mr. Todd's conversation with Mr. Stumma and Mr. Herber when Mr. Todd reported the spill to them. The employer had the ability to present testimony through Mr. Stumma, but did not present such testimony. During the appeal hearing, it was evident that Mr. Herber's recall of events was incomplete and unreliable. Though the evidence does not establish intentional dishonesty or intentional violation of the employer's rules in connection with the final incident, the evidence does establish carelessness on the part of Mr. Todd in causing the spill. However, the evidence does not establish a pattern of carelessness and/or negligence.

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

DECISION:

The August 21, 2017, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The discharge date is corrected to July 19, 2017. 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