

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WUILTON A RODRIGUEZ

Claimant

APPEAL NO. 12A-UI-04767-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

EICHELBERGER FARMS INC

Employer

OC: 03/25/12

Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed a timely appeal from the April 19, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on May 16, 2012. Claimant Wulton Rodriguez participated. Andy Eichelberger, sow farms manager, represented the employer and presented additional testimony through Janet Smith, human resources manager.

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: Wulton Rodriguez was employed by Eichelberger Farms, Inc. as a full-time livestock herdsman from 2006 until March 29, 2012, when Andy Eichelberger, sow farms manager, and Janet Smith, human resources manager, discharged him from the employment. Mr. Rodriguez's immediate supervisor was Jason Randall, unit manager.

The final incident that triggered the discharge was an unauthorized break on March 28, 2012. At a time when Mr. Rodriguez was supposed to be performing work, a coworker discovered Mr. Rodriguez outside lying on the ground taking a break. The coworker used his cell phone to take a picture of Mr. Rodriguez. The coworker shared it with Mr. Randall and Mr. Randall forwarded the photo to Mr. Eichelberger. The employer does not know whether Mr. Rodriguez was sleeping when he was lying on the ground or how long Mr. Rodriguez was taking the unauthorized break. The conduct occurred in the afternoon after lunch break and before the end of the shift. The shift was scheduled to end between 2:00 p.m. and 3:00 p.m. On March 29, Mr. Eichelberger spoke to Mr. Rodriguez about the incident. Mr. Rodriguez told Mr. Eichelberger that he had gone outside to check on something, that there was a nice breeze, and that he had decided to lie down. The employer did not ask how long Mr. Rodriguez had been on the unauthorized break and Mr. Rodriguez did not offer such information. This was the first incident of this kind with Mr. Rodriguez.

In making the decision to end Mr. Rodriguez's employment, the employer considered prior conduct and reprimands. On the morning of February 23, Mr. Randall had issued a written warning to Mr. Rodriguez for attendance and work quality. In response to the reprimand, Mr. Rodriguez clocked out and left for the day without telling anyone. On February 3, the employer had issued a work performance evaluation. The employer noted that Mr. Rodriguez was able to perform tasks but was inclined to slow down and wait for help during those tasks where Mr. Rodriguez perceived there to be more work than he wanted to perform.

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).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See Hurtado v. IDJS, 393 N.W.2d 309 (Iowa 1986). In Hurtado, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The weight of the evidence in the record establishes that Mr. Rodriguez took an unauthorized break of unspecified duration on March 28. The weight of the evidence indicates that this was an isolated incident. The evidence fails to establish that Mr. Rodriguez was sleeping on the job. This isolated unauthorized break would not constitute misconduct in connection with the employment that would disqualify Mr. Rodriguez for unemployment insurance benefits. The weight of the evidence establishes a single unexcused absence on February 23, 2012. The employer has failed to present sufficient evidence to establish additional specific unexcused absences. The single unexcused absence established by the evidence would not constitute misconduct in connection with the employment that would disqualify Ms. Rodriguez for unemployment insurance benefits. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). The employer alleges instances where Mr. Rodriguez failed to properly place heat lamps or ensure that they were working at all appropriate times and failed to keep feeders in proper working order. The employer did not provide sufficient evidence to establish misconduct in connection with those matters.

The decision to discharge Mr. Rodriguez was within the discretion of the employer. However, the issue of whether Mr. Rodriguez was discharged for a reason that would disqualify him for unemployment insurance benefits is a different matter. The evidence in the record establishes conduct that does not rise to the level of substantial misconduct in connection with the employment that would disqualify a claimant for unemployment insurance benefits. In reaching this conclusion, the administrative law judge has relied primarily on the evidence presented by the employer, because the evidence provided by the claimant was of questionable credibility and reliability. Mr. Rodriguez is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Rodriguez.

DECISION:

The Agency representative's April 19, 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.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/kjw