

**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**

**DAWN R JESSEN
BOX 41
508 WILLOW
AURELIA IA 51005**

**TYSON RETAIL DELI MEATS INC
c/o TALX UCM SERVICES
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 06A-UI-07543-DT
OC: 12/11/05 R: 01
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Dawn R. Jessen (claimant) appealed a representative's July 24, 2006 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Retail Deli Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 15, 2006. The claimant participated in the hearing and was represented by union representative Jim Bruman. Matt Chase appeared on the employer's behalf. During the hearing, Employer's Exhibits One through Three were entered into evidence. Based on the evidence, the arguments of the parties and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on September 23, 2003. She worked full-time as a laborer primarily on the 4:30 p.m. to 12:30 a.m. shift in the employer's Cherokee, Iowa, processing facility. Her last day of work was the shift that began the afternoon of June 6, 2006. The employer suspended her on June 7 and discharged her on June 19, 2006. The reason asserted for the discharge was fighting with a coworker.

The claimant had been having difficulties with a coworker, Adelina Sanchez, for some time. On June 6 at approximately 10:00 p.m., Ms. Sanchez struck the claimant in the chest. The claimant reported this to a lead worker and indicated that she wished to file a harassment complaint against Ms. Sanchez. The supervisor told her to wait and complete a harassment complaint form the next day. Another employee overheard the claimant talking about filing the complaint and informed Ms. Sanchez.

After the conclusion of the shift, the claimant visited with some other coworkers for a while and then went to the downstairs locker room to her clothes locker at approximately 12:50 a.m. No one else was in the locker room. After just a few minutes, Ms. Sanchez, whose locker was in the upstairs locker room, came into the claimant's locker room, said something the claimant did not understand, and then backhanded the claimant across the face. As the claimant fell back, Ms. Sanchez began scratching the claimant, pushed her down between the two benches, then started kicking the claimant before climbing on top of the claimant while she continued hitting and scratching the claimant. The claimant tried to pull at Ms. Sanchez' hair to get her off, but Ms. Sanchez rolled to one side of the benches, continued hitting and scratching the claimant, and would not allow the claimant to get up. The claimant then began yelling for help, and after a few minutes some coworkers came in and persuaded Ms. Sanchez to get up and let the claimant up.

There was notable blood in the locker room, as the claimant sustained numerous scratches as well as bruises. Ms. Sanchez then asserted that the claimant was the one who attacked her when she came in to use the restroom and that she was injured. She was sent to the hospital, but there is no evidence of any actual injuries suffered by Ms. Sanchez. The claimant stayed at the plant and provided her statement. The next day, she filed a complaint with the sheriff's office. As a result of the law enforcement investigation, criminal assault charges were brought against Ms. Sanchez, which were pending trial as of the date of this hearing. A sheriff's deputy reported to the claimant that Ms. Sanchez had provided several conflicting statements regarding the incidents.

Since the employer could not determine which of the employees had started the fight, the employer decided to discharge both women. Ms. Sanchez participated in an unemployment appeals hearing on July 31 under 06A-UI-06916-H2T and was awarded unemployment insurance benefits based upon Ms. Sanchez's first-hand testimony in that case that it had been the claimant who had been the aggressor and that she had only acted in self defense. The claimant was not a party to that hearing, nor does it appear that Mr. Chase, who participated on behalf of the employer in that hearing also, was aware of and did not present to that administrative law judge the information regarding the criminal charge pending against Ms. Sanchez.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct.

Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

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).

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or

- b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is fighting with a coworker on the premises. Fighting at work can be misconduct. Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995). However, a discharge for fighting will not be disqualifying misconduct if the claimant shows 1) failure from fault in bringing on the problem; 2) a necessity to fight back; and 3) attempts to retreat if reasonably possible. Savage, supra. While both employees involved in the fight asserted to the employer that the other was the aggressor, obviously that cannot be true. To address the question raised by the employer as to whether the decision of another administrative law judge in the appeal regarding Ms. Sanchez that it was the claimant, not Ms. Sanchez, who was the aggressor, Iowa Code § 96.6-4 provides in pertinent part:

A finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter . . .

The claimant was not a party to the appeal proceeding for Ms. Sanchez; the administrative law judge in that case did not have the opportunity to weigh and consider the testimony of the claimant in contrast to the testimony of Ms. Sanchez. Each administrative law judge must make findings and a decision based upon the testimony presented in the case before them; the findings of the administrative law judge in Ms. Sanchez' case are not binding in this case.

The claimant provided first-hand testimony that she was not the aggressor, that she had only fought back in self-defense, and that she attempted but was unsuccessful in escaping the assault. No first-hand witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from Ms. Sanchez; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether Ms. Sanchez is more credible than the claimant. While not conclusive, the fact that there is a criminal charge pending against Ms. Sanchez as a result of the incident also lends more authority to the claimant's version of events. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's July 24, 2006 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/cs