IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

OVEYDA GOMEZ Claimant **AGRI STAR MEAT & POULTRY LLC** Employer	**APPEAL 18A-UI-00715-JCT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/17/17** **Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 10, 2018, (reference 02) unemployment insurance decision that denied benefits based upon her separation with Agri Star Meat & Poultry LLC. The parties were properly notified about the hearing. A telephone hearing was held on February 8, 2018. The claimant participated personally and was represented by Todd Schmidt, Attorney at Law. The employer participated through Diane Guerrero, Human Resources Manager. Amber Santoyo, Lead Poultry Foreman, also testified. Employer Exhibits 1 and 2, and Claimant Exhibits A, B, C and E were received into evidence. An envelope containing Claimant Exhibit D was received after the hearing, was not admitted into evidence and wholly disregarded. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, 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 disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a QA auditor for the poultry division and was separated from employment on December 21, 2017, when she was discharged for engaging in a physical altercation on the employer premises (Employer Exhibit 1).

The employer provides its rules and expectations in a written handbook. Amongst the conduct prohibited in the workplace is fighting and assault (Employer Exhibit 2). The claimant received a copy of the employer policies upon hire (Employer Exhibit 1) and acknowledged she knew fighting in the workplace could lead to discharge.

The claimant began employment in June 2016, and worked with the father of her two small children, Cardia Evans. The undisputed evidence is the claimant sought and was granted a no-contact/protective order against Mr. Evans in response to a December 2, 2017, incident in

which Mr. Evans punched the claimant in the face (Claimant Exhibit A). This was not the first time Mr. Evans had physically assaulted the claimant (Claimant Exhibit E). Previously the claimant had received stitches to her face after Mr. Evans struck her, which became infected. The claimant had to wear a mask to protect her face, and initially told the employer it was due to a toothache, before later revealing to Ms. Santoyo, the true reason she had the mask.

The protective order was granted on December 2, 2017 (Claimant Exhibit B), which ordered Mr. Evans not to be in the vicinity of the residence or the place of employment of the claimant, Ms. Gomez (Claimant Exhibit B). On December 3, 2017, the claimant informed Ms. Santoyo of the no-contact/protective order. The claimant stated that Ms. Santoyo took a copy of the protective order into the office, made a copy of it, and returned it to the claimant. Ms. Santoyo denied seeing a copy of the protective order, but stated she told the supervisor, Jason Manning, about the order and advised the claimant to produce a written copy for him. No action was taken by the employer, by either Ms. Santoyo, or Mr. Manning, to address the protective order. Ms. Santoyo did not escalate the issue of protective order to human resources. Human resources denied knowing of the protective order until the day of final incident.

The claimant asserted she relayed her concerns on multiple occasions to Ms. Santoyo about continuing to work with Mr. Evans, who would try to upset her and throw chicken feet at her as she walked by. The claimant in her capacity as a QA auditor would inspect the “kill floor”, the same floor where Mr. Evans performed his work. Prior to the final incident, the claimant had requested to Ms. Santoyo that Mr. Evans be reassigned to another department so that she would not have to interact with him, but was informed that due to short staffing, it was not an option. Because Mr. Evans was cross-trained, he also often covered different job duties. The claimant feared going over Ms. Santoyo’s head because she had previously received a verbal warning for going to human resources when she disputed her attendance points, and was informed she must go to Ms. Santoyo or Mr. Manning if she had issues.

On December 19, 2017, while off-duty, Mr. Evans violated the protective order when he entered the claimant’s residence without required accompaniment. Mr. Evans threw items in the house, including a cake, and law enforcement was called (Claimant Exhibit E). The next morning, before work, the claimant called Ms. Santoyo, reporting she was scared to come into work after the night before, because of Mr. Evans’ presence at the workplace. The undisputed evidence is Ms. Santoyo informed the claimant that she needed to come in due to attendance points and to “be strong.” The claimant went to work as directed.

During the shift on December 20, 2017, the claimant and Mr. Evans were both in the laundry services area. Mr. Evans initiated contact with the claimant by laughing at her, calling her a “bitch” and a bum, that he had been with a girl the night before, and telling the claimant, in front of others, “you stink.” The claimant told Mr. Evans to stop, which resulted in him continuing, but louder. The claimant acknowledged she was upset in light of the prior evening and his conduct that day and let her emotions take over. She pushed Mr. Evans in an attempt to make him stop. Mr. Evans then hit the claimant in the nose. The claimant acknowledged she should have gone to the locker room and removed herself from him. The parties were separated by other employees and law enforcement was called. It was unclear whether any charges were filed in response to the incident.

Neither Ms. Guerrero nor Ms. Santoyo were witnesses to the altercation. When trying to investigate the incident, the employer learned there were multiple witnesses who reportedly refused to cooperate or provide statements about what happened, stating they did not want to get involved. No witness or statement of witness was furnished for the hearing. It is the

employer's position that only the claimant engaged in physical contact and that Mr. Evans did not. The following day, the claimant was discharged. Mr. Evans was not discharged.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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:
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> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
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> 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.
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> 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).

Iowa Admin. Code r. 871-24.32(4) provides:

> (4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

In an at-will employment environment, an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

Working with family members or significant others can pose unique challenges in the workplace, where the lines of professional and personal relationships understandably can become blurred. Such is the case here, where both the claimant and the father of her children worked, and in this case, the claimant had a no-contact/protective order with him due to prior incidents of physical assault/domestic violence (Claimant Exhibit A, B, C, E). Challenges can also reasonably arise for the employer in the managing of staffing and both employees.

The administrative law judge recognizes an employer has a responsibility to protect the safety of its employees, from potentially unsafe or violent conduct, in an era where violence in the workplace is real. The administrative law judge is also persuaded that the employer was on notice that there was a genuine safety issue with Mr. Evans and the claimant, after she notified Ms. Santoyo of the obtained no-contact/protective order on December 3, 2017 (Claimant Exhibit A, B). The administrative law judge finds the employer's response to repeated notifications of the claimant's fear for her personal safety to be unsettling. Regardless of whether Ms. Santoyo or any member of human resources/management saw a physical copy of the order itself, they were aware of its existence, and the claimant's continued fear of working around Mr. Evans, because she told Ms. Santoyo repeatedly: first, when she had infected stitches in her face after he struck her, again on December 3, 2017, after obtaining the protective order, and in the days leading up to discharge, when she asked if he could be moved and was told no, because of short staffing. Most recently before discharge, the claimant called Ms. Santoyo in advance of

her shift on December 20, 2017, stating she didn't want to come into work in fear of him, but was told she needed to and to "be strong."

The undisputed evidence is that on December 20, 2017, the claimant and Mr. Evans were in a common laundry services area where he repeatedly egged on the claimant, in front of co-workers calling her a "bitch" and a bum, stating that she stunk, and bragging about being with a woman the night before. The claimant credibly testified she told him to stop. He did not. The administrative law judge does not condone the claimant's conduct of pushing Mr. Evans at the workplace, on December 20, 2017, even after being provoked. It cannot be ignored, however, that Mr. Evans responded by striking the claimant back, hitting her in the face.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976). No first-hand witness to the confrontation (besides the claimant) leading to the claimant's discharge participated in the hearing, nor were any written statements of those individuals were offered. Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser*, *id.,* and noting that the claimant presented direct, first-hand testimony while the employer relied solely upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

Therefore, based on the evidence presented, the administrative law judge concludes that the claimant and Mr. Evans both engaged in a physical altercation in the workplace on December 20, 2017, and only the claimant was discharged. Even though the claimant violated employer policy by pushing Mr. Evans, he responded by striking her in the face and he was not discharged. Since the consequence was more severe to the claimant, than Mr. Evans received for similar conduct, the disparate application of the policy cannot support a disqualification from benefits.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The January 10, 2018, (reference 02) decision is reversed. The claimant was discharged for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any withheld benefits shall be paid.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

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