

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

DIEGO MEMIJE  
APT #13  
111 E 10<sup>TH</sup> ST  
STORM LAKE IA 50588

TYSON FRESH MEATS INC  
C/O TALX UCM SERVICES  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-05084-DT  
OC: 04/17/05 R: 01  
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, 4<sup>th</sup> 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:

Tyson Fresh Meats, Inc. (employer) appealed a representative's May 6, 2005 decision (reference 01) that concluded Diego Memije (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 9, 2005. The claimant participated in the hearing. Sarah Mendoza appeared on the employer's behalf. Guadalupe McCarney served as interpreter. 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 January 13, 2004. He worked full time as a production worker on the night shift in the employer's Storm Lake, Iowa pork processing facility. His last day of work was April 15, 2005. The employer discharged him on April 18, 2005. The reason asserted for the discharge was being involved in an altercation with another employee.

On April 15, 2005, the claimant was working on the line and talking with the coworker beside him. He was giving the coworker a hard time for missing work the prior day, and teasingly called the coworker "lazy." The coworker took exception to the claimant's comments, so the claimant suggested that if the coworker could not take a little kidding, he should not make fun of other people, and proposed that they both stop. The coworker responded by offering to settle the matter physically, and the claimant answered by asking, "Is that what you want?" The coworker then swung his fist and hit the claimant in the mouth, knocking him back. As the claimant regained his footing, he pushed the coworker back with his left hand. He then fell to the floor, and the coworker continued to hit him until an assistant supervisor intervened. He sought medical attention for an injury received in the altercation, and went home. When he returned the following Monday, he was discharged.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue 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 questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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).

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).

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 the altercation with the coworker. 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. The employer asserted that the claimant had been partially at fault in bringing on the problem and had fought back more than necessary for self-defense, specifically suggesting the claimant had tried to cut the coworker with a work knife. However, the claimant denied swinging the knife or contacting the coworker more than to try to push the coworker back after the first hit. 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 accounts from the coworker and other persons; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the witnesses' accounts might have

been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of their reports. Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible, and concludes that he has satisfied the Savage criteria. 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 May 6, 2005 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

ld/pjs