

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LILLIAM GUTIERREZ

Claimant

APPEAL NO: 16A-UI-12268-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 10/16/16

Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the November 8, 2016, reference 02, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on November 29, 2016. The claimant participated in the hearing with CTS Language Link interpreter Sandra. Rogelio Bahena, Human Resources Supervisor, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time utility person on the harvest floor for Swift Pork Company from September 20, 2012 to October 20, 2016. She was discharged for participating in a fight at the workplace.

The claimant was promoted to utility worker in July or August 2016. Her co-worker, Ilene Bastros Otero, was upset about the claimant's promotion because she expected to get that job herself. Ms. Otero began harassing the claimant through text messages but because she sent the messages during non-work hours the claimant believe the employer could not take any action to stop Ms. Otero's harassment of the claimant.

On October 18, 2016, the claimant ate lunch in the locker room rather than the cafeteria in an attempt to avoid Ms. Otero. The claimant was on the phone speaking to her landlord when Ms. Otero entered the locker room, grabbed the phone from the claimant's hand, and hit her on the safety helmet she was wearing. The claimant grabbed her phone back and stated, "If you want to hit me go ahead," and Ms. Otero replied she was not going to hit the claimant because they were at work but made the statement with her index finger pointed in the claimant's face. The claimant told Ms. Otero to leave the locker room and she left at that time and the claimant resumed her phone call. Ms. Otero returned a short time later and hit the claimant in the arm, grabbed her by her hair, and took her to the ground. Because Ms. Otero had a handful of the

claimant's hair in her hand and the claimant on the ground, the claimant did not have an opportunity to retreat. As Ms. Otero continued hitting the claimant the claimant hit her back in self-defense. A co-worker witnessed the end of the fight but not the beginning or the events leading up to it.

The employer has a zero tolerance for fighting policy and as a result the claimant's employment was terminated October 20, 2016.

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 § 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.

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 proving disqualifying misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful

wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

Ms. Otero had been harassing the claimant for several weeks prior to the fight October 18, 2016. Because Ms. Otero was careful to only send the claimant inappropriate text messages outside of work hours the claimant was under the mistaken impression the employer could not take any action against Ms. Otero in an effort to stop the harassment. The claimant attempted to avoid Ms. Otero October 18, 2016, by eating lunch in the locker room but Ms. Otero sought her out and hit her on her safety helmet. The claimant simply told her to leave the locker room at that time and because Ms. Otero did so the claimant did not immediately report the incident to the employer. Ms. Otero returned to the locker room, however, and struck the claimant in the arm and grabbed her hair, taking her to the ground in the process. At that point, the claimant could not retreat or seek supervisor assistance and she was forced to either defend herself or face potentially serious injury. The claimant understandably chose to defend herself.

The administrative law judge finds the claimant was not the aggressor in the fight and was unable to retreat or ask a supervisor for assistance after Ms. Otero returned to the locker room the second time. Under these circumstances, the claimant's conduct cannot be considered intentional, disqualifying job conduct as that term is defined by Iowa law. Therefore, benefits are allowed.

DECISION:

The November 8, 2016, reference 02, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/rvs