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

Appeal Number: 06A-UI-07605-DT
OC: 07/09/06 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.

RAMON R LIZARRAGA
2919 – 5TH AVE
COUNCIL BLUFFS IA 51501-3448

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

JOE BASQUE
ATTORNEY AT LAW
532 – 1ST AVE STE 300
COUNCIL BLUFFS IA 51503-0803

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ramon R. Lizzarraga (claimant) appealed a representative's July 27, 2006 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 17, 2006. The claimant participated in the hearing. Mark LeFevre appeared on the employer's behalf and presented testimony from one other witness, Julie Avalos. Ike Rocha 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 September 11, 2000. He worked full-time as a box palletizer in the employer's Council Bluffs, Iowa, plant. His last day of work was June 26, 2006. The employer discharged him on June 28, 2006. The reason asserted for the discharge was fighting with another employee.

The claimant normally worked a schedule of 4:00 p.m. to either 12:30 a.m. or 2:00 a.m. On June 26 at approximately 6:30 p.m., the claimant was working and became upset with a coworker who was not working but came and sat behind him. The coworker was laughing at the claimant and suggesting he was old. The claimant told the coworker to start helping, but he did not. The claimant then pushed at the coworker's shoe with his own shoe, and put his hand on the coworker's shoulder and gave a little nudge. The coworker then got up and walked away and the claimant continued working.

The employer learned of the incident and spoke to various other workers who had been in the area. Some of them reported that the claimant had kicked the coworker in the knee. Mr. LeFevre, then spoke to the claimant through an interpreter, Ms. Avalos, who is also a human resources clerk. He acknowledged some contact of his shoe with the coworker's shoe, and acknowledged some contact of his hand to the coworker's shoulder, but indicated it was just a little nudge to try to get the coworker to get back to work. The employer asserted that the claimant had admitted "kicking" the coworker's shoe; at hearing, the claimant denied that it was a "kick" but was again a light nudging contact to try to get the coworker to get back to work.

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. Fighting at work can be misconduct. Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995). The claimant denied that the contact was any more than nudging. 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 on the second-hand accounts from the witnessing coworkers; however, without that information being provided

first-hand, the administrative law judge is unable to ascertain whether the coworkers were credible, or whether the employer's witnesses might have misinterpreted or misunderstood aspects of their reports. Even so far as the claimant's "admission" of "kicking," the administrative law judge is not convinced that the term "kick" cannot have nuances that were here lost in interpretation, and it does not appear that in the employer's interview with the claimant there was any inquiry as to the degree of force of the "kick." Under the circumstances, the administrative law judge finds the claimant's first-hand information more credible. While the claimant's contact with the coworker potentially could have lead to a fight, the administrative law judge cannot conclude that the actions of lightly nudging a shoe and a shoulder constitute "fighting." Under the circumstances of this case, the claimant's making any physical contact at all with the coworker was the result of inefficiency, unsatisfactory conduct, inadvertence or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 27, 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 he is otherwise eligible.

ld/cs