

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD A REITZ
Claimant

APPEAL NO. 09A-UI-09596-L

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 05/17/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 23, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on July 20, 2009 in Des Moines, Iowa. Claimant participated. Employer did not participate.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time boxing back ribs from December 11, 2006 through May 12, 2009 when he was discharged. He was suspended pending investigation on May 4, 2009. He was performing his job towards the end of the night and a man and a coworker Martha walked through the area pushing a barrel. The man returned and began shoving some pieces of cardboard as large as four-by-eight feet towards claimant in his work area. Claimant told him, "no" and directed him by pointing to an open area where the janitor picks up the cardboard. The man kept pushing the cardboard saying "over there" and pointed into claimant's work area. Claimant folded the cardboard and tossed it around the man towards the janitor pick up area. The man moved to intercept the cardboard and it hit his arm. He made a lunging movement towards claimant so claimant raised his arm with an open hand in a defensive move in front of him, which connected with the man's hard hat. The man continued forward and pushed against claimant's chest with his hand. They both stopped, backed up, and said, "Fuck you asshole." The entire incident took two to three minutes. There were no witnesses. Claimant returned to his job. The man opened and looked into the chiller door and left the area. Supervisor Marco arrived a few minutes later and told claimant to go to the personnel office. Claimant was interviewed, suspended pending investigation and interviewed again a week later. Employer told him they would contact him within five days but did not. Claimant called a union representative who finally told him of the separation. Claimant was unaware until later that the man was not fired until later for other reasons. Other employees have been involved in

extensive physical fights and were not discharged but were suspended for three days and returned to work. Foul language and arguments are common in the work areas at Swift.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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.

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.

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).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. Claimant's recollection of the incident is credible. The conduct for which claimant was discharged was not aggressive or fighting but was merely a defensive reaction to the other man's aggressive move towards him. Since the other man actually pushed claimant's chest but was not discharged for the incident, the disparate application of the policy cannot support a disqualification from benefits. Benefits are allowed.

DECISION:

The June 23, 2009, reference 01, decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. The benefits withheld effective the week ending May 23, 2009 shall be paid to claimant forthwith.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs