

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**AMANDA JOHNSON**  
Claimant

**APPEAL NO. 07A-UI-08131-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**NPC INTERNATIONAL INC  
PIZZA HUT**  
Employer

**OC: 07/22/07 R: 02  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

NPC International, Inc./Pizza Hut (employer) appealed a representative's August 16, 2007 decision (reference 01) that concluded Amanda Johnson (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 September 10, 2007. The claimant participated in the hearing. Brad Paterno appeared on the employer's behalf. 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 May 26, 2005. She worked part time (25 – 30 hours per week) as a shift manager in the employer's Des Moines, Iowa, area pizza restaurant. Her last day of work was July 25, 2007. The employer discharged her on that date. The reason asserted for the discharge was having a disagreement with another employee.

On the evening of July 25, the claimant was taking a smoking break outside the back of the restaurant near the kitchen entrance. A delivery driver who was doing dishes indicated he wanted to take a smoking break, but the claimant denied his request, as drivers were able to smoke while they were making deliveries and so were not supposed to take smoking breaks when they were in the restaurant. The employee began initially playfully pushing at the claimant but began to start pushing even harder to the point of punching the claimant's arm. The claimant kept telling the employee to stop, but he did not until she grabbed his hands with her hands and told him that she was going to "kick his a - -" if he did it again. Another delivery driver entered the area at that time and came between the claimant and the employee; the claimant then sent the first delivery driver home for the rest of the evening and put a call into the employer to report the incident.

The involved employee was one that the claimant had complained about to the employer in the past as far as being difficult to control. The employer discharged that employee due to the conduct on July 25, but also discharged the claimant due to the verbalized “threat” to engage in physical violence against the employee.

**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.

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 her "threat" to become physically violent with the employee. 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 reasonable possible. Savage, supra. The claimant substantially was in compliance with these requirements. Her verbalized "threat" was not shown to be a bona fide threat to in fact become physically violent, as compared to a show of bravado to seek to cause the employee to back off; in essence, it was a necessary defensive act. Under the circumstances of this case, the claimant's comment to the employee 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, as compared to intentional, substantial, or repeated misbehavior. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The employer made some reference to complaints from customers received after the claimant was discharged that customers had heard some of the argument and that customer service was affected, but it is clear that those concerns arose subsequent to the decision to discharge the claimant and were not the basis of the employer's decision to discharge the claimant; those concerns cannot now be used to establish misconduct. Larson v. Employment Appeal Board, 474 N.W.2d 570 (Iowa 1991). 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 August 16, 2007 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 she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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