

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**TOMASA GOMEZ PEREZ**  
Claimant

**SWIFT PORK COMPANY**  
Employer

**APPEAL 17A-UI-06575-LJ-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/28/17**  
**Claimant: Appellant (1)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the June 20, 2017 (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged for conduct not in the best interest of her employer. The parties were properly notified of the hearing. A telephone hearing was held on August 2, 2017. The claimant, Tomasa Gomez Perez, participated. The hearing was facilitated with the assistance of Spanish/English interpreters Roger (ID #8725) and Louis (ID #10552) of CTS Language Link. The employer, Swift Pork Company, participated through Nicholas Aguirre, Human Resources Manager. Employer's Exhibits E-1 through E-33 were received and admitted into the record.

**ISSUE:**

Was the claimant discharged for disqualifying job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time, most recently as a scale clerk, from March 9, 2015, until May 30, 2017, when she was discharged. Claimant worked overnights, from 6:00 p.m. until 6:00 a.m. During her shift on May 23-24, claimant was involved in an altercation with both a coworker and a driver employed by a third-party contractor. During this altercation, claimant yelled at both her coworker and the contractor. She told the driver that he was a liar and she hung up on him. Claimant testified that the driver was not being rude or disrespectful toward her. The employer learned about the incident when the driver contacted the employer. (Exhibit E-12) The employer collected two witness statements from claimant's coworkers. (Exhibits E-13 and E-14) Weber's statement indicates claimant also screamed at her and was upset at both her and the driver.

Claimant admits that she became upset and raised her voice toward the driver. She maintains that she was provoked by her coworker and that the driver was blaming her for the issue he was experiencing. Claimant had received several prior warnings for similar conduct. The employer counseled claimant on January 25, 2016, for allegedly making a threatening comment about her

coworker. (Exhibit E-16) On March 7, 2016, claimant received a final written warning for becoming involved in an altercation with her coworker. (Exhibit E-4)

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying, job-related misconduct. Benefits are withheld.

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). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* After assessing the credibility of the witnesses who testified during the hearing, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's testimony more credible than claimant's testimony.

Here, claimant yelled at and hung up on a driver who was employed by a third-party contractor affiliated with the employer. That same day, claimant also yelled at her coworker. Claimant had been warned about similar conduct in the past on two occasions. She should have been aware that her job was in jeopardy for further altercations, as she had been placed on a final written warning. The employer has established that claimant was discharged for disqualifying, job-related misconduct. Benefits are withheld.

**DECISION:**

The June 20, 2017 (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

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Elizabeth A. Johnson  
Administrative Law Judge

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Decision Dated and Mailed

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