

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARIA G GUTIERREZ
Claimant

APPEAL NO. 09A-UI-07748-JT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 04/26/09
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

Maria Gutierrez filed a timely appeal from the May 21, 2009, reference 01, decision that denied benefits. Ms. Gutierrez requested an in-person hearing. After due notice was issued, a hearing was held on July 8, 2009. Ms. Gutierrez participated. Tony Luse, Employment Manager, represented the employer. Spanish-English interpreter Patricia Verploeg assisted with the hearing. Exhibit One was received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Maria Gutierrez was employed by Swift & Company as a full-time production worker from July 2002 until April 24, 2009, when Tony Luse, Employment Manager, suspended her from the employment. Mr. Luse subsequently discharged Ms. Gutierrez on April 28, 2009.

The incident that prompted the discharge occurred on the morning of April 24, 2009 in the women's locker room at the Swift (JBS) production plant. A new employee, Anna, directed derogatory remarks at Ms. Gutierrez, who responded in kind. Ms. Gutierrez and Anna had some distant familial relationship through marriage. Anna had her work helmet in one hand and a sharpening steel in her other hand. Anna came at Ms. Gutierrez with the sharpening steel. Ms. Gutierrez was in fear that she would be injured by the sharpening stone. Ms. Gutierrez used one hand to grab the hand holding the sharpening stone and used her other hand to grab Anna's face and push her backward. Ms. Gutierrez's mother and sister are Swift employees and were present in the locker room at the time of the incident. Ms. Gutierrez's mother and sister intervened to separate Anna and Ms. Gutierrez. The argument and exchange of derogatory remarks between Anna and Ms. Gutierrez continued a few minutes long. The women then exited the locker room. Anna continued with her derogatory remarks and Ms. Gutierrez responded in kind. A supervisor and the plant manager became involved and the two women were escorted to different areas of the office. Initially the women were in

eye-contact. Anna took the opportunity to raise her fist in a threatening gesture directed at Ms. Gutierrez.

When Mr. Luse arrived for work that morning, the women were waiting in the office. Mr. Luse received a report from the plant manager regarding what had allegedly taken place. Anna had a swollen abraded area by one of her eyes. Ms. Gutierrez had a small scratch on her face. Mr. Luse interviewed the two women separately and each alleged the other had instigated the altercation. Ms. Gutierrez told Mr. Luse that she had acted in self-defense. Mr. Luse also interviewed Ms. Gutierrez's mother and sister, who provided statements corroborating Ms. Gutierrez. Mr. Luse interviewed two other employees believed to have been present, but those employees denied having observed the altercation. Mr. Luse interviewed an employee named Pam Jones, who asserted that Ms. Gutierrez had instigated the physical altercation. Ms. Jones is still employed at Swift. Mr. Luse concluded that Anna and Ms. Gutierrez had each violated the employer's zero-tolerance policy prohibiting fighting in the workplace and discharged both from the employment.

Ms. Gutierrez had worked for the employer for seven years without incident. Mr. Luse considered Ms. Gutierrez an excellent employee.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a “current act,” the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

This case ultimately comes down to the employer's burden of proving misconduct. The employer has not provided any testimony from anyone who witnessed the incident that triggered Ms. Gutierrez's discharge from the employment. The employer had the ability to present such testimony. The administrative law judge concludes that the employer has failed to provide sufficient evidence, and sufficiently direct and satisfactory evidence, to rebut Ms. Gutierrez's testimony that physical altercation was very brief and that Ms. Gutierrez's involvement was limited to a single self-defensive measure when she was in fear of immediate harm. Under the situation described by Ms. Gutierrez, she did not have an opportunity to retreat in that instant she became aware that Anna was attempting to hit her with the sharpening steel.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Gutierrez was discharged for no disqualifying reason. Accordingly, Ms. Gutierrez is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Gutierrez.

DECISION:

The Agency representative's May 21, 2009, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs