

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE K ALLEN
Claimant

APPEAL NO: 07A-UI-00966-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 12/10/06 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Michelle K. Allen (claimant) appealed a representative's January 16, 2007 decision (reference 02) that concluded she 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 February 13, 2007. This appeal was consolidated for hearing with one related appeal, 07A-UI-00967-DT. The claimant participated in the hearing. Jerome Rinken 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 June 28, 2005. She worked full time as a production worker in the employer's Waterloo, Iowa pork processing facility. Her last day of work was December 6, 2006. The employer suspended her that day and discharged her on December 7, 2006. The reason asserted for the discharge was fighting with a coworker the prior day.

The claimant worked the 3:30 p.m. to 12:00 a.m. shift. On December 6 at approximately 8:00 p.m. she had gone to the nurses' office to get medicine for a headache. When she entered, she saw some other people sitting and waiting, including a woman who had been reportedly telling other coworkers that the claimant was spreading rumors about her. The claimant asked the coworker why she was saying the claimant was spreading rumors when she was not. The coworker responded that the two of them should go down to the bathroom to discuss the matter. The coworker got up and went out of the office down the hall toward the bathroom, and the claimant followed. When they got to the doorway of the bathroom, the coworker turned and began scratching the claimant. The claimant then pushed the coworker

away. About this time the employer's safety director stepped into the hall and between the two women. Both were then sent home on suspension and then fired.

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 fighting at work. 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. While it may not have been good judgment for the claimant to challenge the coworker on the question of the rumor, under the facts that were presented the administrative law judge cannot conclude that raising the issue alone constituted fault in bringing on the problem. Upon being scratched, it was reasonably necessary for the claimant to fight back by pushing the coworker away.

Some question is raised as to whether the claimant retreated when the safety director appeared; the employer provided second hand testimony that when the safety director stepped in the claimant attempted to get away from him in order to continue to go after the coworker. However, the claimant denied that she was seeking to get away from the safety director because she was trying to go after the coworker; rather, she testified that she was seeking to get away from the safety director because she wished to get further away from the coworker. No witness was available at the hearing to provide testimony to the contrary under oath and subject to cross-examination. The employer relies exclusively on the second-hand account from the safety director; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the safety director might have been mistaken, whether he is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the safety director's report. The administrative law judge therefore accepts the claimant's version as more credible. She has therefore satisfied the requirements of the Savage test. 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 January 16, 2007 decision (reference 02) is reversed. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs