

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESSIE B RIVERA
Claimant

APPEAL NO. 07A-UI-05092-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

FOODS INC
Employer

**OC: 04/22/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Foods, Inc. (employer) appealed a representative's May 9, 2007 decision (reference 01) that concluded Jessie B. Rivera (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 June 6, 2007. The claimant participated in the hearing. David Johnson 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 January 22, 2005. Since early March 2007 she worked full time as deli worker at the employer's store. Her last day of work was April 18, 2007. The employer discharged her on April 23. The reason asserted for the discharge was a dispute with her department manager.

On April 18 the claimant reported for work, as she had previously been scheduled, to discover that her schedule for the day had been altered without notice. Her department manager noticed during the day that the claimant seemed upset and asked the claimant "what are you so 'pissy' about?" The claimant then began to explain her discontent in having her scheduled changed with no notice. The department manager then became angry with the claimant and told her to go home, that she was going to take the matter up with Mr. Johnson, the store director. She then reported to Mr. Johnson that the claimant had told her "take the job and shove it." The claimant was then contacted and told not to come in for work but to come in on April 23 to meet with Mr. Johnson and the department manager.

When the claimant came in on April 23 the department manager challenged the claimant for saying "take the job and shove it." The claimant denied making that statement, to which the department manager responded, "Are you calling me a liar?" The claimant replied that she was

not calling the manager a liar, but was saying that she had not made the statement that the manager could “take the job and shove it.” The manager then became exasperated and told Mr. Johnson that “the answer is ‘no,’” and left the office.

Mr. Johnson had previously privately told the department manager that it was up to her as to whether she wanted to keep the claimant on as an employee. After the manager left the office saying “no,” the claimant asked Mr. Johnson whether she was fired. He at first made no response, so she asked again, to which he responded with a general assent. Despite the claimant’s denial of having made the comment about “take the job and shove it,” Mr. Johnson believed the department manager and, therefore, also concluded the claimant’s conduct in the office demonstrated an undesirable attitude and felt he had no choice but to honor the manager’s decision to end the claimant’s employment.

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 demonstration of a negative attitude toward her job and her manager. However, the claimant denied making the negative statement with which she was initially charged. 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 secondhand account from the department manager; however, without that information being provided firsthand, the administrative law judge is unable to ascertain whether the manager might have been mistaken, whether she is credible, or whether the employer’s witness might have misinterpreted or misunderstood aspects of the manager’s report. Under the circumstances of this case, the administrative law judge concludes that the claimant’s testimony is more credible. 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 May 9, 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw