

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**UNISA BANGURA**

Claimant

**APPEAL NO. 11A-UI-05860-VS**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**

Employer

**OC: 04/10/11**

**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a representative's decision dated May 3, 2011, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 16, 2011, in Davenport, Iowa. The claimant participated. Laureen Parks was a witness for the claimant. The employer participated by Nikki Bruno, human resources generalist, and Maria Bozaan, human resources manager. The record consists of the testimony of Maria Bozaan; the testimony of Nikki Bruno; the testimony of Unisa Bangura; and the testimony of Laureen Parks.

When the claimant began testifying, the administrative law judge became concerned that English was not the claimant's first language and asked him whether he understood English. The claimant's first language is Krill. He brought his friend, Laureen Parks, with him to assist him with the language. The claimant was concerned that his accent would be difficult to understand. The administrative law judge assured the claimant that she could understand him but that she wanted to be certain that he understood English and felt comfortable testifying and participating in the proceedings. The administrative law judge offered to continue the hearing in order to get an interpreter if the claimant felt it was necessary. The claimant stated that he wanted to proceed and that Ms. Parks could assist him if necessary. Ms. Parks did assist the claimant a few times with a particular word or phrase. She also testified because she had personal knowledge of one phone call the claimant had with the employer, as she participated in that call. The administrative law judge believes that the claimant did understand the questions in English and was able to answer in English with minimal assistance from Ms. Parks.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a food manufacturer with a plant located in West Liberty, Iowa. The claimant was hired on April 7, 2009. The claimant was a full-time production general laborer. He worked second shift. His last day of work was April 6, 2011. He was suspended pending an investigation of a complaint made by another employee. The claimant was terminated on April 11, 2011.

The incident that led to the claimant's termination occurred on April 6, 2011. Another employee came over to the claimant's line. The claimant believed this other employee to be his friend. As a form of greeting, the claimant and this employee would bump each other's knuckles.

This other employee made a complaint to the supervisor that the claimant had made unwelcome physical contact with him. The employer conducted an investigation. The employer interviewed other employees who were present and the claimant. The employer concluded that the physical contact was an elbow to the chest that moved the other employee about one foot. The claimant was terminated for violation of employer's written policy concerning physical contact and fighting in the workplace.

The employee who made the complaint about the claimant and the eyewitnesses did not testify at the hearing.

#### **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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer is entitled to have work rules that prohibit violence in the workplace, including unwanted physical contact and fighting, and can reasonably expect that an employee will follow those rules. The employer has the burden of proof to establish misconduct.

In this case, there is insufficient evidence to establish misconduct. The only participant or witness to event on April 6, 2011, who testified at the hearing was the claimant. He testified that he simply bumped knuckles with this other employee as a form of greeting. He thought this other employee was his friend. He denied chest bumping or engaging in anything other than the knuckle bump. He demonstrated what he did at the hearing and it was simply a tap, similar to what a handshake might be.

Ms. Bozaan testified that the employer did a thorough investigation and that the witness stories were similar. She also stated that the other employee did not welcome what the claimant allegedly did. However, none of these individuals were present to testify at the hearing and the administrative law judge did not have the opportunity to weigh the credibility of their testimony against the claimant's testimony.

Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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).

The Iowa Court of Appeals set forth a methodology for making the determination as to whether hearsay rises to the level of substantial evidence. In Schmitz v. Iowa Department of Human Services, 461 N.W.2d 603, 607-608 (Iowa App. 1990), the Court required evaluation of the "quality and quantity of the [hearsay] evidence to see whether it rises to the necessary levels of trustworthiness, credibility and accuracy required by a reasonably prudent person in the conduct of their affairs." To perform this evaluation, the Court developed a five-point test requiring agencies to employ a "common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better evidence; (4) the need for precision; (5) the administrative policy to be fulfilled." Id. At 608.

Absent testimony from either the complaining employee or other eyewitnesses, the administrative law judge must accept the sworn testimony of the claimant. The employer may have had good business reasons for terminating the claimant. The employer, however, did not present sufficient evidence at this hearing to disqualify the claimant from receiving unemployment insurance benefits. Benefits are allowed, if the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated May 3, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw