

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE ALFARO

Claimant

APPEAL NO: 15A-UI-14026-JE-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SMITHFIELD FARMLAND CORP

Employer

OC: 11/15/15

Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the December 9, 2015, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 13, 2016. The claimant participated in the hearing with CTS Language Link Interpreter Jocelyn. Becky Jacobsen, Human Resources Manager and Sha Htoo, Production Worker, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time production worker for Smithfield Farmland from November 18, 1998 to November 11, 2015. He was discharged for allegedly kicking another employee.

On November 6, 2015, the claimant believed co-worker Sha Htoo was making faces at him and mocking him behind his back when Mr. Htoo was speaking to employee Marta Salvin. The claimant testified he could see Mr. Htoo out of the corner of his eye and turned around before making a kicking motion near Mr. Htoo. Mr. Htoo said, "What happened? I did nothing to you," and the claimant replied in Spanish which Mr. Htoo does not speak or understand. The claimant indicated he was angry and lost his head in the moment which led him to want to kick Mr. Htoo in the leg but that he just made the kicking motion without striking Mr. Htoo. At break time, approximately 12 minutes later, Mr. Htoo reported the incident to his supervisor and informed him the claimant did kick him in the leg. After reporting the situation to his supervisor, Mr. Htoo went in the restroom and looked around his knee area where a red mark formed from being kicked by the claimant. The employer placed the claimant on indefinite suspension and sent him home while it conducted an investigation.

The employer interviewed other employees in the area and Ms. Salvin was the only witness to the incident. She confirmed Mr. Htoo's account of the situation and that the claimant kicked Mr. Htoo. The employer terminated the claimant's employment November 11, 2015, for violating its Code of Business Conduct and Ethics which states that any act of violence will result in immediate termination of employment. The claimant had not received any previous warning for incidents with co-workers where he acted inappropriately.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of

unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

While the claimant denies kicking Mr. Htoo in the leg November 6, 2015, Mr. Htoo's testimony that the claimant kicked him in the right leg without provocation or warning is more persuasive and consistent with the evidence and is also supported by the statement provided to the employer from Ms. Salvin, the only witness to the event. The claimant acknowledges that he believed Mr. Htoo was making faces at him and mocking him behind his back and that made him angry. He admits that he "lost his head in the moment" and wanted to kick Mr. Htoo but stated while he made a kicking motion near Mr. Htoo he did not make contact with his leg. The claimant knew if he kicked Mr. Htoo he would lose his job. Mr. Htoo's complaint was specific and he testified he had a red mark on his leg where the claimant kicked him. The two men had not experienced any prior disagreements.

Even if the claimant did not actually strike Mr. Htoo's leg with his foot, the mere act of trying to make Mr. Htoo believe he was going to do so is by definition an assault. Attempting to frighten another by leading him to believe that individual is going to do him harm is not acceptable either. Both can be considered an assault and workplace violence and the employer cannot tolerate the assault of one employee by another.

That said, however, the claimant is a 27-year veteran of the employer without any previous reports of incidents involving problems with co-workers or warnings about any type of threatening or violent behavior. This incident was out of character for the claimant and one moment of poor judgment should not define his tenure with the employer. While the employer had the right to terminate the claimant's employment, this was an isolated incident of misconduct where the claimant admitted he "lost his head in the moment." Although not condoning the claimant's behavior, the administrative law judge must conclude the claimant's actions do not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The December 9, 2015, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs