

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EMILIO MENDEZ-RUBI**  
Claimant

**APPEAL NO: 12A-UI-15070-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**SWIFT PORK COMPANY**  
Employer

**OC: 11/04/12**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 12, 2012, reference 02, 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 February 19, 2013, and continued on February 22, 2013. The claimant participated in the first portion of the hearing with Interpreter Patricia Vargas and the second part with Interpreter Olga Esparza. Javier Sanchez, Human Resources Assistant Manager, participated in the first part of the hearing and Tonya Box, Human Resources Assistant, participated in the second portion of the hearing on behalf of the employer. Employer's Exhibits One through Five were admitted into evidence.

**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 Swift Pork Company from May 4, 2009 to November 12, 2012. On December 5, 2011, the claimant was placed on an one-year Last Chance Agreement and suspended November 28 through December 5, 2011, after he was accused of sexually harassing a female co-worker by pinching her butt. The claimant's ex-girlfriend told his current girlfriend when they were in the locker room on break that the claimant was still bothering and harassing her. The claimant's current girlfriend was teary when she returned from break and when the claimant asked her what was wrong she explained the situation to him and he went to confront his previous girlfriend about her comments to his current girlfriend. She was with her current boyfriend and the claimant asked her why she was lying about him and she slapped him in the face. Her actions were witnessed by two management employees but nothing was done about her behavior. The claimant started removing his equipment to go to the office and his ex-girlfriend slapped him in the face two more times. The claimant grabbed her hand and told her to stop hitting him. He went to the office and reported that his ex-girlfriend was hitting him and knocked his glasses off. His ex-girlfriend was called to the office and lied to the employer about why she hit him, stating he pinched her butt. Even though he would have had to do so in front of her boyfriend the employer believed

the claimant's ex-girlfriend's story and placed the claimant on a Last Chance Agreement, which stated that any further violations of the employer's "Best Work Environment" policy, covering workplace behavior, would result in termination.

On November 1, 2012, at the beginning of his shift, there were only two of the scheduled four team members present to pull pork tongues, which is a difficult job, and the claimant was frustrated because there was too much work for two people. Two other team members arrived, including Reynaldo Haro-Sanchez, who did not want to be in that department. The claimant was assigned to pull tongues and yelled at the supervisor he was not doing all of them by himself, he was only doing his own job and not that of any other employees. He continued to complain about the department being short-staffed during the past two and one-half weeks although the usual number of associates was present at that time. There were approximately 15 pork heads on the floor then and the supervisor was upset. After the claimant's continual complaints and comment that the supervisor needed to help them, the supervisor finally had enough and ordered the claimant to get down from the line and go to the office. Mr. Haro-Sanchez also got off the line and stated he should be sent to the office instead of the claimant. The supervisor and Mr. Haro-Sanchez yelled at each other before the claimant went to the office where he was suspended pending further investigation of the incident. After a full investigation, the employer terminated the claimant's employment November 12, 2012, for violating his Last Chance Agreement by failing to follow the Best Work Environment policy.

#### **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 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 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). The situation that resulted in the one year Last Chance Agreement December 5, 2011, was not the claimant's fault, but rather that of a vindictive ex-girlfriend. His ex-girlfriend slapped him in the face three times and the claimant's only reaction was to grab her hand to prevent her from striking him again and to go to the office to report the incident. It is simply not logical that the claimant would have pinched his ex-girlfriend's butt in front of her current boyfriend, but is much more likely that she needed to quickly invent a story to excuse her behavior in assaulting the claimant. Without the Last Chance Agreement being in place, it is doubtful the claimant's actions November 1, 2012, would have resulted in his termination. While the claimant was undoubtedly upset and frustrated about being short-staffed for the previous two and one-half weeks, his behavior was unprofessional and inappropriate. As a team member he should have expected to have to pitch in on occasion when other employees were tardy or absent and he should have kept his emotions in check rather than yell at his supervisor, get off the line, and tell his supervisor he needed to help them. That said, however, while not condoning the claimant's actions November 1, 2012, the administrative law judge must conclude the claimant's actions on that date were an isolated incident of misconduct, there were no previous, legitimate documented instances of misconduct, and his behavior November 1, 2012, does not rise to the level of disqualifying job misconduct as that term is defined by Iowa law. Therefore, benefits are allowed.

#### **DECISION:**

The December 12, 2012, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css