IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

WILBERT A BOUDREAUX Claimant **SWIFT PORK CO** Employer	**APPEAL 16A-UI-06002-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 05/08/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the May 26, 2016 (reference 01) unemployment insurance decision that denied benefits based upon misconduct. The parties were properly notified about the hearing. A telephone hearing was held on June 15, 2016. Claimant participated and was represented by union representative Brian Ulin. Employer participated through employment manager Alejandra Rojas and human resource supervisor Rogelio Bahena.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed in the cut department beginning September 8, 2015. Claimant was terminated on May 18, 2016.

Employer has a policy that prohibits employees from threatening other individuals in the workplace. Claimant was aware of the policy, as it was included in the employee handbook received upon commencement of employment.

On May 9, 2016, employer brought claimant into human resource office to speak to him about an attendance issue. Claimant was on his way to the work floor, so he had a piece of steel in his hand. Claimant brought the piece of steel into the meeting. Human resource supervisor Rogelio Bahena, supervisor Wes McIntire, and union representative Brian Ulin were present, as well as one other supervisor and one other union representative.

At the beginning of the meeting, claimant was seated. As the meeting progressed, claimant learned he was being assigned attendance points for absences he believed had been excused by supervisor Wes McIntire. Employer informed claimant they were suspending his employment pending further investigation. Claimant became upset. Claimant stood up and was speaking with his hands. Claimant was holding the piece of steal while speaking with his hands, but he did not direct the piece of steel at anyone in a threatening manner. Claimant used the word “fuck” at least once. Supervisor Wes McIntire also became upset. McIntire was standing

and speaking in a raised voice. Human resource manager Martha Gutierrez entered the room and asked claimant to sit down. At that point, union representative Brian Ulin took claimant out in the hall to allow him an opportunity to calm down. Supervisor Wes McIntire followed them out into the hall and asked, "Is he still down there running his mouth?" Ulin told McIntire to go away. When claimant was out in the hall, he commented to Ulin that when he was younger the situation would have caused him to become physically aggressive. McIntire overheard the comment and reported it to Bahena.

After a while, claimant reentered the room and sat down. Bahena reminded claimant that he was being suspended pending further investigation and claimant left the premises.

On May 18, 2016, employer terminated claimant for threatening physical violence while out in the hallway and for his behavior during the May 9, 2016, meeting.

Claimant had never been previously warned about similar conduct.

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.
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> 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 to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000).

Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.,* 391 N.W.2d 731 (Iowa Ct. App. 1986). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

As an initial matter, claimant did not threaten anyone. He made a comment, as many people do, about something he would have done in his more immature days.

Claimant did behave inappropriately during the meeting. Claimant stood up out of his chair and spoke in an "upset" voice while using profanity. Claimant should have thought twice before "talking with his hands" when he was holding a piece of steel. However, claimant's behavior is less blameworthy given the fact that a supervisor, McIntire, was intentionally provoking claimant.

Furthermore, claimant had never been previously disciplined for similar behavior. The conduct for which claimant was discharged was an isolated incident of poor judgment. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment, especially given supervisor McIntire's similar but less egregious conduct throughout the incident.

If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning.

Employer has failed to establish claimant was terminated for misconduct.

DECISION:

The May 26, 2016 (reference 01) unemployment insurance decision is reversed. Claimant was separated for no disqualifying reason. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

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Christine A. Louis
Administrative Law Judge
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Decision Dated and Mailed

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