IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

TIMOTHY A FOOTE
19 ELMWOOD DR
COUNCIL BLUFFS IA 51503

TYSON FRESH MEATS INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-00398-RT
OC: 12-07-03 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Timothy A. Foote, filed a timely appeal from an unemployment insurance decision dated January 8, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on February 4, 2004, with the claimant participating. The employer, Tyson Fresh Meats, Inc., did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the notice of appeal. The employer is represented by TALX UC eXpress, who is aware of the need to call in a telephone number in advance of the hearing. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer, most recently as a general supervisor, from August 14, 2000 until he was separated from his employment on December 3, 2003. At that time the claimant was called in to the office of the plant manager and given the choice of either being discharged or resigning. The claimant chose to resign under the threat of a discharge.

The claimant was going to be discharged for allegedly violating the employer's anti-harassment policy. The employer has a harassment policy prohibiting harassment, including sexual harassment. The claimant was aware of that at all material times hereto. In October of 2003 the claimant had a sexual encounter with a female team member who was a subordinate to the claimant. The claimant was not her direct supervisor, but was the general supervisor over the female. The female employee asked if the claimant wanted to get together and if she could come over to his house and talk. He consented. The female employee initiated this contact. Eventually a sexual encounter occurred. The claimant had known the female employee for approximately three and one-half years. Both were single. The incident occurred at the claimant's house after work hours and was unrelated to his employment. The claimant regretted the incident thereafter. The claimant had no contact with the female employee thereafter. The claimant did not offer or bribe the female employee with any employment benefits in return for the sexual encounter. The claimant never made any efforts to contact or have a relationship with the female employee after the incident. Approximately two months later, on December 1, 2003, the female employee went to human resources and told human resources that she felt uncomfortable continuing to work at the employer's plant because of the incident in question. The female employee did not file a sexual harassment charge and informed the employer that she did not believe that she had been harassed or that any harassment had occurred. She merely indicated she felt uncomfortable continuing to work for the employer.

The employer's policy is silent about relationships between a supervisor and a subordinate but does prohibit sexual harassment. The claimant was aware of the policy and received training in the policy. The claimant was also aware of his position of authority over subordinates. The claimant had never been accused of this behavior before and had never received any related warnings or disciplines.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether claimant's separation from employment was a disqualifying event. It was not.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The administrative law judge concludes that the claimant did resign or quit his employment. However, the administrative law judge further concludes on the evidence here that the claimant was compelled to resign because he was given the choice of resigning or being discharged. This is not considered a voluntary leaving. Accordingly, the administrative law judge concludes that the claimant was, in effect, discharged.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of his duties and/or evincing a willful or wanton disregard of an employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The claimant testified credibly. The claimant conceded that he had a sexual encounter in October of 2003 with a subordinate team member at his house. The claimant also conceded that he was aware of the employer's sexual harassment policy and that he was further aware of his position of authority over a subordinate. Despite this, the claimant had a sexual encounter with a female subordinate. He testified that he had known her for three and one-half years and that she had initiated the initial contact by asking him if he wanted to get together and if she could come over to his house to talk. They got together and then had the sexual encounter. There is no evidence that the claimant did not fully consent to the sexual encounter. The claimant credibly testified that he offered no inducements or employment benefits for the sexual encounter. Both were single. The claimant also credibly testified that he had had no contact with the female employee after the incident and had not attempted to try to see her thereafter. Approximately two months later, on December 1, 2003, the female employee went to human resources and informed them of the incident and indicated that she felt uncomfortable at the employer. This led to the claimant's forced resignation or discharge. The claimant had never been accused of this behavior before nor had he received any warnings or disciplines. This is a close question. The administrative law judge has no tolerance for sexual harassment. The claimant here was aware of the employer's sexual harassment policy and aware further of his position of authority, but nevertheless had a sexual encounter. What finally convinces the administrative law judge that the claimant did not violate the employer's sexual harassment policy was the claimant's credible testimony that the policy does not prohibit relationships between a supervisor and a subordinate, but merely sexual harassment, and that further, the female employee informed the employer that she did not believe she had been harassed and that no harassment had occurred, but that she just felt uncomfortable in continuing to work there. The administrative law judge also notes that the claimant credibly testified that the female employee did not file sexual harassment accusations or charges against the claimant.

Although it is a close question, based upon the record here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's behavior rises to the level of disqualifying misconduct as defined above. Certainly, the claimant's behavior was unwise and inappropriate, but on the record here the administrative law judge must conclude that the claimant's behavior was ordinary negligence in an isolated instance and is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). Although it is a close question, the administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment

insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of January 8, 2004, reference 01, is reversed. The claimant, Timothy A. Foote, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible.

b/b