

**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**

**VALENTINEA L DEVIRERO
193 POLE LINE RD
POSTVILLE IA 52162**

**TYSON RETAIL DELI MEATS INC
C/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-06354-HT
OC: 04/04/04 R: 04
Claimant: Respondent (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

STATEMENT OF THE CASE:

The employer, Tyson, filed an appeal from a decision dated May 28, 2004, reference 01. The decision allowed benefits to the claimant, Valentinea DeVirero. After due notice was issued a hearing was held by telephone conference call on July 6, 2004. The claimant participated on her own behalf and Rosemary Paramo-Ricoy acted as interpreter. The employer participated by Human Resources Manager Brooke Salger. Exhibits One and Two were admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Valentinea DeVirero was employed by Tyson from September 21, 2000 until April 8, 2004. She was a full-time laborer.

On April 5, 2004, the claimant was attempting to clean a machine and a co-worker, Pat Torson, was trying to put plastic over it. They appeared to be getting irritated with one another rather than working together. At some point the claimant's elbow came in contact with Ms. Torson's body, at which time the co-worker went to the office and reported that the claimant had struck her. An investigation was done by interviewing witnesses, including two participants. Ms. DeVirero maintained it was accidental contact while she was working. Other witnesses confirmed the claimant had "elbowed" Ms. Torson while the two of them were working on the machine.

The claimant was discharged and Ms. Torson was disciplined for violating the "dignity and respect" policy.

Valentinea DeVirero has received unemployment benefits since filing a claim with an effective date of April 4, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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 claimant maintained she accidentally elbowed Ms. Torson in the stomach while they were both working on the machine. However, the witness statements submitted by the employer do not support this interpretation of the event. While the statements all agree physical contact was made, none of the witnesses interpreted the incident as accidental. The claimant and Ms. Torson were apparently irritated with each other and Ms. Torson's discipline by the employer indicates she was partly to blame for the incident. However, the claimant did make inappropriate physical contact with another employee. It is a violation of the work rules and is conduct not in the best interests of the employer. She is disqualified.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 28, 2004, reference 01, is reversed. Valentinea DeVirero is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$4,048.00.

bgh/kjf