

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSE AYALA
Claimant

APPEAL NO: 13A-UI-09856-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 07/21/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's August 14, 2013 decision (reference 01) that concluded Jose Ayala (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 14, 2013. The claimant participated in the hearing. Chris Rossiter appeared on the employer's behalf. Olga Esparza served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

OUTCOME:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 5, 2000. He worked full time as a production laborer in the load out department of the employer's Columbus Junction, Iowa pork processing facility. His last day of work was July 12, 2013. The employer discharged him on July 15, 2013. The reason asserted for the discharge was fighting on the employer's property.

Just after the claimant had clocked in at 6:00 a.m. on July 12 he was passing through a hallway near the personnel and supervisors' offices when he encountered a worker employed by an entity that did contract sanitation work for the employer. The claimant had previously told this worker to stay away from his estranged wife, and on this occasion when passing this worker he repeated his admonition that the worker stay away from and not call his wife. The sanitation worker responded by getting in the claimant's face, within a very short distance of him. The claimant put his arms up and pushed back on the sanitation worker's chest to clear some distance so that he could get away.

Another employee of the employer then summoned a supervisor, and the situation did not proceed further. An employee of the employer stated to the employer that the claimant had had the sanitation worker up against the wall with his hand to the worker's throat. The claimant denied that the worker was up against the wall or that he had his hand to the worker's throat; he testified that his only physical contact with the worker was to push away enough to make some room to get away.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is fighting on the employer's property. Fighting at work can be misconduct. *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995). A discharge for fighting will not be disqualifying misconduct if the claimant shows 1) failure from fault in bringing on the problem; 2) a necessity to fight back; and 3) an attempt to retreat if reasonable possible. *Savage*, supra. The employer relies exclusively on the second-hand account from other employees to suggest that the claimant had been the physical aggressor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the purported witnesses might have been mistaken, whether they actually observed the entire time, whether they are credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the reports. The claimant's first-hand testimony was that he only had incidental physical contact, and he did not have the sanitation worker up against the wall with his hand to the worker's throat as asserted by the employer through its second-hand testimony. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of

proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant engaged in physical aggression. While the claimant might not be full without fault in bringing on the problem, the claimant's physical contact was incidental to an attempt to retreat, and was not in and of itself aggression. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 14, 2013 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs