IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HANS E NISSEN JR
Claimant

WRIGHT TREE CARE COMPANY
Employer

APPEAL NO: 08A-UI-10680-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/05/08 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Hans E. Nissen, Jr. (claimant) appealed a representative's November 6, 2008 decision (reference 02) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment with Wright Tree Care Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held on December 3, 2008. The claimant participated in the hearing. David Williams of TALX Employer Services appeared on the employer's behalf and presented testimony from three witnesses, Shane Churchill, Chad Sutherland, and Michelle Eggleston. 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?

FINDINGS OF FACT:

The claimant started working for the employer on January 3, 2008. He worked full time as a tree care crew foreman. His last day of work was September 25, 2008. The employer discharged him on that date. The reason asserted for the discharge was his involvement in a fight with a groundsman on September 24 and failure to properly handle the situation as a manager.

On September 24 the claimant and the groundsman were working on preparing a tree for removal from a residential property in Winterset. They had worked until approximately 7:00 p.m., at which point it was determined that a truck would be sent the next day to remove the large debris. The groundsman was preoccupied with something not relating to work, and the claimant asked him to assist in picking up their tools so they could leave. The claimant then asked for the lockup keys, which the groundsman had been using a few minutes prior. The groundsman replied that he had misplaced the keys, and the claimant began looking in the truck cab. The groundsman then stated that he had found the keys, and the claimant stepped back out of the truck cab. Before the claimant was prepared to catch the keys, the groundsman tossed them at the claimant so that they hit the claimant in the chest and fell to the ground. The

claimant picked up the keys and stood up, asking, "What's up?" The groundsman yelled at the claimant and said, "You don't want to do that," and punched the claimant in the mouth. After recovering from the hit, the claimant stated, "I can't believe you just did that. You're done on this team, I don't need you on my team anymore." The claimant then called Mr. Sutherland, the acting general foreman, to report what had happened but indicating he believed he could return to the employer's West Des Moines shop with the groundsman without further problem.

The claimant apologized to the home owner, who had witnessed the event, and advised the home owner the other truck would be there the next morning to remove the debris. The claimant then got into the truck with the groundsman and began driving down the street. After going only a short distance, the claimant reiterated to the groundsman, whom he had considered a friend, that he "couldn't believe" that the groundsman had actually physically struck him, and began to say that the groundsman needed to lose his "prison boy "b - - - -" attitude." However, he only got as far as saying the groundsman needed to lose his "prison boy" when the groundsman again began punching the claimant in the mouth. The claimant stopped the truck, got out, and again called Mr. Sutherland, reporting what had happened and indicating that he could not or would not drive the groundsman back to West Des Moines, so Mr. Sutherland came and gave the groundsman a ride back. The groundsman asserted to the employer that the claimant had "gotten in his face" about picking up tools before the first altercation, and had also ignored the groundsman's alleged earlier request to be back to the shop b 6:00 p.m., allegedly saying he "didn't give a f - - -." The groundsman also asserted to the employer that before he punched the claimant in the truck in the second altercation, the claimant had given him a jab in the ribs. The claimant denied these assertions and allegations in his sworn testimony at the hearing, and the employer did not present any other direct testimony to the contrary.

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 his involvement in the altercations with the groundsman on September 24. Fighting at work can be misconduct. Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995). However, 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) attempts to retreat if reasonable possible. Savage, supra. 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 himself engaged in physical aggression or that he failed to retreat.

The greatest concern is whether the claimant had some fault in bringing on the second altercation by his statement in the truck about the groundsman needing to lose his "prison boy" attitude. It was this statement the employer also found to be a failure on the part of the claimant to be an effective supervisor. While perhaps not the wisest thing the claimant could have said under the circumstances, as compared to saying nothing, the administrative law judge concludes that the statement, at least as far as the claimant got in making the statement, was not such an obviously inflammatory statement as to have substantially contributed to causing the second altercation. As to it being a display of poor management, the statement was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, and was a good faith error in judgment or discretion. 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 November 6, 2008 decision (reference 02) is reversed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs