

BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

DARRELL A JONES

Claimant

and

SWIFT PORK COMPANY

Employer

HEARING NUMBER: 19BUI-02507

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Darrell A. Jones, worked for Swift Pork Co. from October 2, 2017 through March 1, 2019 as a full-time utility worker. On March 1, 2019, as the Claimant hosed down the floor in the back of the work area, water got on another co-worker, Mr. Peterson, who no longer had on his rain gear. As the Claimant walked away, Peterson came up behind him. When Jones turned around, Peterson grabbed him by the collar, told him to watch where he was spraying, and shoved Jones backwards onto hoses on the ground. (21:40) As Jones attempted to recover his balance, Peterson shoved the Claimant again. Jones instinctively pushed Peterson away and ran off as Peterson is a bigger man than Jones, and the Claimant did not want to escalate the matter.

Peterson reported that Jones punched him in the face; both men were suspended. The Employer investigated the matter by speaking to two unnamed witnesses and reviewing surveillance video, which was unclear as to whether Peterson pushed Jones, or whether he tripped and fell backward. When the Employer questioned the Claimant, he denied punching Peterson. The Claimant asked to see the video, but the Employer did not allow him to view it. The Employer terminated Mr. Jones for violating its zero tolerance policy against violence in the workplace, and suspended Peterson. The

Employer had no prior issues with the Claimant.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665, (Iowa 2000) (quoting *Reigelsberger v. Employment Appeal Board*, 500 N.W.2d 64, 66 (Iowa 1993)).

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 Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Claimant's version of events. According to the Claimant's testimony, he did not punch Peterson, but rather shoved him back to get away from him. In this respect, the Claimant did attempt to retreat in an effort to de-escalate the situation, as is required in *Savage v. Employment Appeal Board*, 529 N.W.2d 640 (Iowa App. 1995), wherein the court held that in order to establish that the claimant acted out of self-defense, he must show freedom from fault, a necessity to fight back and an attempt to retreat. The Claimant also denied there were any witnesses in that area of the incident.

Although the Employer contests Jones' assertion, the Employer provided no corroborating evidence to support his hearsay statements about the alleged incident.

871 IAC 24.32(4) provides:

Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In the cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

By the Employer's own account of what was on the video, it was admittedly blurry, at best. The fact the Employer would not allow the Claimant to review the video, and that it wasn't submitted as evidence at the hearing, makes it more probable than not the video was not probative of the Employer's case. Additionally, the Employer's failure to produce any witnesses to corroborate its report is somewhat corroborative of the Claimant's testimony there were no firsthand witnesses outside of the parties themselves. The Employer offered no cogent explanation as to why these alleged 'unnamed' witnesses were not available at the hearing. Based on this record, we conclude the Employer failed to satisfy its burden of proof.

DECISION:

The administrative law judge's decision dated April 10, 2019 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, benefits are allowed provided the Claimant is otherwise eligible.

Ashley R. Koopmans

James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

I respectfully dissent from the decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

Kim D. Schmett