IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

PAUL B LONPEAH Claimant **TYSON FRESH MEATS INC** Employer	**APPEAL 17A-UI-00613-NM-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 12/11/16** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the January 12, 2017, (reference 01) unemployment insurance decision that denied benefits based upon his discharge for fighting on the job. The parties were properly notified of the hearing. A telephone hearing was held on March 10, 2017. The claimant participated with the assistance of Gio-Dan interpreter Diggs Toweh. The employer participated through Employment Manager Kris Rossiter and witness Mark Johnston. Employer's Exhibits 1 through 6 were received into evidence.

ISSUE:

Was the claimant discharged for disqualifying job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a production laborer from December 2, 2008, until this employment ended on December 3, 2016, when he was discharged.

On December 2, 2016, claimant was involved in an altercation with another employee. According to Johnston he saw another employee trying to squeeze behind claimant. Johnston testified it appeared claimant deliberately back his rear-end into the other employee. The two then began to argue and Johnston saw claimant poke the other employee twice with his finger. The other employee then slapped claimant. Johnston then broke the two apart before things could escalate.

Claimant denied he ever made deliberate contact with the other employee. Claimant testified he did not back into the other employee, but that the employee pushed him. Claimant testified he turned around and told the other employee not to push him, while making a pointing gesture towards him, but denied he ever made contact with the employee. Claimant told the employer that the other employee was pushing him, even after he asked him to stop. (Exhibit 4). According to claimant it was common for this employee to engage in harassing behavior towards him.

The employer has a policy in place which provides for immediate termination for fighting on company property. (Exhibit 6). Claimant was given a copy of this policy upon his hire. (Exhibit 5). Based on the information provided by Johnston about the incident, claimant was discharged for fighting. (Exhibits 1 and 2). Claimant had no prior warnings or disciplinary action.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa

Ct. App. 1984). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

In an at-will employment environment an employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, it incurs potential liability for unemployment insurance benefits related to that separation. A determination as to whether an employee's act is misconduct does not rest solely on the interpretation or application of the employer's policy or rule. A violation is not necessarily disqualifying misconduct even if the employer was fully within its rights to impose discipline up to or including discharge for the incident under its policy.

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.*. In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the claimant's version of events to be credible. Johnston testified that it appeared claimant deliberately backed into the employee. Based on the testimony given, it sounds as though the space where the incident took place was very small and it is likely that, if claimant did back into the other employee, this was done on accident. Johnston also testified he saw claimant poke the other employee in the mouth twice. Claimant denied poking the other employee, but testified he was pointing at him. Claimant's explanation is more plausible given the circumstances. While it may have appeared to Johnston that claimant poked the other employee, claimant's testimony that he was just pointing in credible.

The conduct for which claimant was discharged was an isolated incident of poor judgment. Claimant testified the other employee involved had been harassing him for quite some time. Given the circumstances, claimant should not have engaged with the other employee. However, the employer has provided insufficient evidence that claimant deliberately engaged in an act of physical aggression towards the other employer. Before this incident claimant had no prior disciplinary history. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Training or general notice to staff about a policy is not considered a disciplinary warning. Inasmuch as employer had not previously warned claimant about the issue leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning.

DECISION:

The January 12, 2017, (reference 01) unemployment insurance decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided he is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

_____
Nicole Merrill
Administrative Law Judge

_____
Decision Dated and Mailed

nm/