

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIEN A BALLIER

Claimant

APPEAL NO. 07A-UI-00745-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC

Employer

**OC: 11/26/06 R: 03
Claimant: Respondent (2)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct
Iowa Code section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the January 5, 2007, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 6, 2007. Claimant Brien Ballier participated and presented additional testimony from Ruth Ballier, Chris Roby, Larry Holmes and Paula Horn. Production Supervisor Jerome Rinken represented the employer. The administrative law judge took official notice of the Agency's records regarding benefits disbursed to the claimant and received claimant's Exhibit A into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Brien Ballier was employed by Tyson Fresh Meats as a full-time, second-shift production worker from April 5, 2005 until November 21, when Human Resources Manager Elena Reader placed him on a disciplinary suspension pending a decision regarding his further employment. On November 27, Ms. Reader discharged Mr. Ballier for fighting at the workplace. The incident that prompted the discharge occurred on November 20, 2006 and involved Mr. Ballier's spouse, Ruth Ballier, who also worked for the employer at the time of the incident. One or more employees reported to the employer that Mr. Ballier had assaulted Mrs. Ballier in a hallway at the end of the November 20 shift. Mrs. Ballier had observed Mr. Ballier talking to a female coworker on the production line. Mrs. Ballier became jealous and told Mr. Ballier that she was taking the couple's truck and leaving without Mr. Ballier. At the end of the shift, Mr. Ballier exited the production area and confronted Mrs. Ballier in the hallway near the men's and women's locker rooms. Mr. Ballier grabbed Mrs. Ballier by the hair. Mr. Ballier said, "Come here, bitch." Mr. Ballier grabbed Mrs. Ballier's coat and pushed Mrs. Ballier against the wall. Mrs. Ballier slipped out of her coat and ran down the hall out of the plant.

On November 21, the employer conducted an investigation of the incident. The employer interviewed three witnesses to the incident, Hannah Bruns, Jennifer Bauer, and Jose Rosales. All three employees provided consistent oral and written statements regarding Mr. Ballier's assault of Mrs. Ballier.

The employer interviewed Mrs. Ballier. Mrs. Ballier told the employer that Mr. Ballier had pulled her arm, pushed her against a wall, and called her a bitch. Mrs. Ballier provided a written statement, in which Mrs. Ballier indicated that the couple had had a "misunderstanding," that Mr. Ballier had grabbed her arm and called her a bitch, and that she had placed herself against the wall. The interview occurred and the written statement was completed on November 21.

The employer interviewed Mr. Ballier. Mr. Ballier told the employer that Mrs. Ballier had observed him talking to a woman, had made a driving gesture with her hands, and had indicated she was going to leave him. Mr. Ballier told the employer that after his shift he asked Mrs. Ballier for his keys, she refused, he grabbed her by the arm, she started yelling and causing a scene, that he let her go and she started running. Mr. Ballier provided a written statement. Mr. Ballier wrote that his wife had gotten mad, said she was taking his truck, and said she was leaving him to walk home. Mr. Ballier wrote that after work he asked Mrs. Ballier for the keys and she refused to provide them. Mr. Ballier wrote that he grabbed her arm and asked for the keys, but that Mrs. Ballier refused to relinquish the keys and ran from him. The interview occurred and the written statement was completed on November 21.

On November 21, union steward Markiyonna Winston provided a written statement in which he indicated that he had walked through the parking lot after work on November 20, heard a woman screaming, and saw a man hitting a woman. Mr. Winston wrote that the next morning he was asked to represent the same couple, Mr. and Mrs. Ballier, at a meeting with the employer.

The employer has a code of conduct that prohibits employees from touching or grabbing other employees. The code of conduct is reviewed with employees during orientation and is posted in the hallways.

Mr. Ballier established a claim for benefits that was effective November 26, 2006 and has received benefits totaling \$3,223.00.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Brien Ballier was discharged for misconduct in connection with the employment. It does.

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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The greater weight of the evidence in the record establishes that Mr. Ballier assaulted Mrs. Ballier at the workplace at least once on November 20, 2006. The administrative law judge has considered that the employer's evidence was in the form of hearsay. However, that hearsay evidence consisted of written statements provided by several individuals on November 21, the day after the incident. All of the statements are consistent with regard to

Mr. Ballier initiating contact with Mrs. Ballier in the hallway. Mrs. Ballier's written and oral statements confirmed that she had in fact been assaulted. The three third-party witnesses to the incident who provided statements were consistent in their description of the assault.

Mr. Ballier's and Mrs. Ballier's description of the incident has evolved since the statements they provided on November 21. Mr. Ballier and Mrs. Ballier each now denies even that Mr. Ballier grabbed Mrs. Ballier's arm. The overwhelming weight of the evidence indicates otherwise. Mr. Ballier's and Mrs. Ballier's refusal to concede even this most basic fact in the face of overwhelming evidence, including their own written statements, calls into question the credibility of their testimony in general.

Mr. Ballier provided testimony from three additional witnesses, Chris Roby, Larry Holmes, and Paula Horn. Mr. Roby testified the couple was just talking during the "brief second" he was in the hallway. Mr. Holmes initially testified that the couple was arguing, that Mr. Ballier reached for his keys, and that it looked like Mr. Ballier grabbed his wife. Upon further questioning, Mr. Holmes indicated that he came upon the scene just as Mrs. Ballier was walking away. Ms. Horn's testimony indicated she lacked any meaningful knowledge of the event.

The administrative law judge concludes that the written and oral statements provided close in time to the incident provide the most reliable evidence of what actually occurred. Those statements establish that Mr. Ballier assaulted Mrs. Ballier at the workplace.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Ballier was discharged for misconduct. Accordingly, Mr. Ballier is disqualified for benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The employer's account shall not be charged for benefits paid to Mr. Ballier.

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.

Because Mr. Ballier has received benefits for which he has been deemed ineligible, those benefits constitute an overpayment that Mr. Ballier must repay to Iowa Workforce Development. Mr. Ballier is overpaid \$3,223.00.

DECISION:

The Agency representative's January 5, 2007, reference 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until he has worked in and paid wages for insured work equal to ten times his weekly benefit allowance,

provided he meets all other eligibility requirements. The employer's account will not be charged. The claimant is overpaid \$3,223.00.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/css