

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SELIM OSMIC**  
Claimant

**APPEAL NO. 10A-UI-02674-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**TYSON FRESH MEATS INC**  
Employer

**OC: 01/24/10**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Selim Osmic filed a timely appeal from the February 15, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 5, 2010. Mr. Osmic participated. At the scheduled time of the hearing, the employer waived its right to participate. Bosnian-English interpreter Aldijana Radoncic assisted with the hearing. Exhibits A and B were received 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: Selim Osmic was employed by Tyson Fresh Meats, Inc., as a full-time production worker from 2001 until January 24, 2010, when Jim Hook, Human Resources, discharged him from the employment for allegedly fighting on the job. On January 22, 2010, Mr. Osmic was performing his duties when another employee, Jason, made derogatory and profane remarks concerning Mr. Osmic's ability to keep up with his assigned duties. Mr. Osmic looked for a supervisor to intervene. Mr. Osmic then approached the coworker and asked him why he was making the comments. The coworker attacked Mr. Osmic and grabbed Mr. Osmic by the neck. Other coworkers had to intervene to free Mr. Osmic. Mr. Osmic did not fight back. Mr. Osmic had no opportunity to withdraw prior to being freed by his coworkers. Immediately after being freed by his coworkers, Mr. Osmic and his assailant were directed to the employer's Human Resources Department. The employer suspended Mr. Osmic. On January 25, 2010, the employer notified Mr. Osmic that he was discharged from the employment.

## REASONING AND CONCLUSIONS OF LAW:

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.

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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

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 employer waived its right to participate and thereby failed to present any evidence to support the allegation that the claimant was discharged for fighting in the workplace. The evidence in the record indicates that the claimant was the victim of an assault and did not in fact engage in fighting in the workplace.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Osmic was discharged for no disqualifying reason. Accordingly, Mr. Osmic is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits paid to Mr. Osmic.

**DECISION:**

The Agency representative's February 15, 2010, reference 01, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/pjs