

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SALINA S OCHOA

Claimant

APPEAL NO. 13A-UI-12682-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT PORK COMPANY

Employer

OC: 10/13/13

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated October 31, 2013, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was held on January 16, 2014. The claimant participated personally. Rosa Parra and Dinora Avalos were witnesses for the claimant. The employer participated by Luis Meza, human resources supervisor. The record consists of the testimony of Luis Meza; the testimony of Salina Ochoa; the testimony of Rosa Parra; the testimony of Dinora Avalos; and Employer's Exhibits 1-30. Anna Pottebaum served as Spanish interpreter.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a pork processing company located in Marshalltown, Iowa. The claimant was hired on June 5, 2002. She was a full-time production worker. Her last day of work was October 8, 2013. She was terminated on October 15, 2013.

The incident that led to the claimant's termination occurred on October 8, 2013. The claimant's sister, Lala, was employed by PSSI, a contractor that did work at the plant in Marshalltown, Iowa. Lala and another PSSI employee named Mayra Guitierrez, got into a physical fight. The claimant and several other employees tried to separate Lala and Mayra and stop the fight. There were multiple witnesses to the fight and multiple versions of what exactly occurred. The claimant was placed on suspension pending an investigation because some witnesses said that the claimant pulled Mayra's hair during the fight. After the investigation was complete, the employer terminated the claimant because it determined that the claimant was involved in the fight. The employer has a zero tolerance for violence in the workplace.

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. An employer has a material interest in providing a safe working environment for its employees, vendors, and customers. The legal definition of misconduct excludes errors of judgment or discretion. The employer has the burden of proof to show misconduct.

The claimant is eligible for unemployment insurance benefits. In reviewing the testimony and multiple statements, the administrative law judge found differing accounts on what role the claimant played in the fight between Lala and Mayra. The claimant apparently said something to Mayra and Mayra in turn responded with a vulgar statement. The physical altercation was between Lala and Mayra, with Mayra throwing the first punch. The employer terminated the claimant because there were some witnesses who said that the claimant pulled Mayra's hair. The claimant credibly denied this allegation and her witness, Dinora Avalos, said that she did not see the claimant pull Mayra's hair. Ms. Avalos was present for the entire fight and she too was trying to separate Lala and Mayra. None of the individuals who asserted that the claimant had pulled Mayra's hair actually testified at the hearing. Their credibility could not be judged by the administrative law judge.

The employer's evidence is hearsay. While hearsay is admissible in administrative hearings, it has limited probative value in proving misconduct. Findings must be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs. Iowa Code Sec. 17A.14(1). Allegations of misconduct 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).

Although the evidence showed that the claimant was involved in the fight between Lala and Mayra, the most credible evidence is that she was attempting to separate the two of them and was not throwing punches or pulling hair. The claimant should have immediately reported the incident to management instead of trying to break up the fight herself. This is an error of judgment or discretion, not misconduct. Since there is insufficient evidence of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated October 31, 2013, reference 01, is reversed. Unemployment insurance benefits are allowed, if the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs