

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SEFIJA LULIC
Claimant

APPEAL NO: 10A-UI-00230-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON PREPARED FOODS INC
Employer

OC: 12/06/09

Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Sefija Lulic (claimant) appealed a representative's December 31, 2009 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Tyson Prepared Foods, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 17, 2010. The claimant participated in the hearing and was represented by Kate Mitchell, attorney at law. Ron Wood appeared on the employer's behalf. Janja Pavetic-Dickey served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 27, 2003. She worked full time as a team member / production worker in the employer's Waterloo, Iowa food processing facility on the first shift. Her last day of work was December 3, 2009. The employer discharged her on that date. The reason asserted for the discharge was having too many work performance disciplinary actions.

The claimant had received disciplinary actions on July 15, 2009, July 31, 2009, and August 10, 2009 for issues relating to the proper handling and inspection of food product. The August 10 discipline included a three-day suspension. The next level of progressive discipline under the employer's policies is termination.

On December 3 during a break in production the claimant left the work area and went to a break area in a box shop. There is a table and chair between the work area and the box shop. For quality and food safety reasons, workers are to take off their work frocks and leave them on the table before entering the box shop. For the same reason, workers are not to bring gum or other food items from the box shop area back into the work area. On December 3 the claimant's

supervisor made a report that the claimant had been in the box shop wearing her frock, and that she had gum in her mouth in the work area. The claimant denied these allegations in her first-hand testimony. She credibly testified that she had left the frock on the table before entering the box shop, and that she had spit out her gum as she left the box shop.

The claimant had been in the box shop with two coworkers. As the three left the box shop, the other two employees began trying to take the claimant's paycheck away from her to look at. When the claimant resisted, the two coworkers began grabbing, pushing, and pinching the claimant. She was not consenting or willingly participating in the physical contact, but was the victim of the contact. The claimant's supervisor made a report that the claimant had engaged in horseplay with the coworkers.

Because of the employer's conclusion that the claimant had committed quality and food safety violations by wearing her frock into the box shop and having gum in the work area, as well as the employer's conclusion that she had engaged in horseplay with the two coworkers, the employer determined an additional disciplinary action step would be taken. Because the next step was termination, the claimant was discharged.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason cited by the employer for discharging the claimant is the conclusion that the claimant had committed additional violations meriting another step in the disciplinary process, bringing her to termination. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions

reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant in fact committed any additional violations on December 3. The employer relies exclusively on the at least second-hand account from the claimant's supervisor; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether the supervisor might have been mistaken, whether he actually observed the entire time, whether he is credible, or whether the employer's witness might have misinterpreted or misunderstood aspects of the supervisor's report. The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's December 31, 2009 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs