

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**ABIGAEL NGULU MAWUSA**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL 18A-UI-02482-NM-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 12/10/17**  
**Claimant: Appellant (2)**

Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the January 10, 2018, (reference 01) unemployment insurance decision that denied benefits based on her discharge for excessive tardiness. The parties were properly notified of the hearing. A telephone hearing was held on March 22, 2018. The claimant participated with the assistance of a French interpreter from CTS Language Link. The employer participated through Human Resource Associate Katherine Schoepske. Department's Exhibit D-1 was received into evidence.

**ISSUES:**

Is the appeal timely?

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 general laborer from July 18, 2016, until this employment ended on December 5, 2017, when she was discharged.

On December 2, 2017, claimant was working at her machine on the line and needed to use the restroom. The last restroom break was approximately two hours earlier and claimant had approximately one hour left in her shift. The employer's policies allow employees to take additional restroom breaks if they call a supervisor to relieve them first. On December 2, 2017, claimant attempted to contact her line supervisor for relief, but the supervisor did not respond. Claimant then asked the supervisor of a nearby line to relieve her. That supervisor refused, stating claimant needed to get her own supervisor for relief. Claimant then saw another employee, who was assigned to the next line over, but knew how to operate her machine, and asked that employee to relieve her. That employee agreed and took over claimant's machine while she used the restroom. When claimant returned she was told by her coworker that the other line supervisor had reprimanded her for relieving claimant and stated claimant needed to

be relieved by her own supervisor. Claimant then approached the other line supervisor and tried to explain that her supervisor had not responded to her request for relief and she could not wait to use the restroom. The supervisor told claimant to go back to work, which she did.

On December 4, 2017, claimant was called into the office by her supervisor. Claimant's supervisor brought up the December 2 incident and accused claimant of being disrespectful to the other supervisor. Claimant attempted to explain what happened and asked the supervisor why she did not come to relieve her. The supervisor indicated she did not have to explain herself to claimant and informed her she was being discharged for using the restroom. Claimant testified she only had one prior disciplinary action and was never advised her job was in jeopardy prior to her termination.

Schoepske testified claimant was discharged for coming back late from break, but did not know how late claimant was or when her break was scheduled. Schoepske further testified she could not dispute claimant's version of events from December 2, 2017. Schoepske testified claimant did have four prior disciplinary actions, the most recent one being issued in November 2017, but did not provide copies of these documents for the hearing. Schoepske was not sure if claimant was ever advised her job was in jeopardy.

A disqualifying unemployment insurance decision was mailed to the claimant's last known address of record on January 10, 2018. The claimant received the decision within the appeal period. Claimant does not read or understand English and therefore was unable to read or understand the decision. Claimant had a friend interpret the decision for her, but did not realize he did not read it to her in its entirety and left out information about her appeal rights. Sometime after receiving the decision, claimant attempted to contact Iowa Workforce Development (IWD), and possibly the appeals bureau, but no one was able to assist her as there was no interpreter available. After several attempts to call, claimant went in to her local IWD office in Waterloo, on February 22, 2018, where an interpreter was able to explain her appeal rights. Claimant filed her appeal that same day.

## **REASONING AND CONCLUSIONS OF LAW:**

The first issue to be considered in this appeal is whether the appellant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6(2) provides:

2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of § 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to § 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 10, and has the burden of proving

that a voluntary quit pursuant to § 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving § 96.5, subsection 1, paragraphs "a" through "h". Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Bd. of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976). The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa 1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

Here, the claimant's lack of proficiency in English created a language barrier, which hindered her ability to file her appeal by the prescribed deadline. Claimant testified she made a good-faith attempt to have the decision interpreted for her, but did not realize at the time that portions of the letter were not read to her. Her inability to personally understand the fact finding decision affected her ability to timely appeal the adverse decision through no fault of her own. Due process principles apply in the context of appeal hearings for persons seeking unemployment benefits. *Silva v. Employment Appeal Board*, 547 N.W.2d 232 (Iowa App. 1996). Two of the benchmarks of due process are adequate notice and meaningful opportunity to be heard. The claimant was not afforded due process rights. While the claimant was literally provided the decision, she could not timely comply with the appeal instructions, as she required additional time to fully understand the decision, along with her corresponding appeal rights and instructions. Once claimant was able to seek and receive assistance in understanding the decision and her appeal rights, she immediately filed an appeal. Accordingly, the claimant's appeal is accepted as timely.

The next issue to be decided is whether the claimant was discharged for disqualifying misconduct. 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.

Here, the employer has failed to establish a final act of misconduct. Claimant provided credible testimony, which the employer was unable to refute, that she was discharged for using the restroom while at work. Claimant testified she asked at least two supervisors to relieve her so she could use the restroom. One supervisor failed to respond and the other refused to provide relief. Claimant then asked a coworker to relieve her. Claimant's actions were reasonable given the circumstances. No misconduct is established.

Even if claimant's conduct could be considered misconduct, 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. Again, the claimant provided credible testimony that she was never warned her job was in jeopardy. The employer did not provide any evidence or testimony to the contrary. 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 10, 2018, (reference 01) unemployment insurance decision is reversed. The claimant's appeal is timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

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Nicole Merrill  
Administrative Law Judge

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Decision Dated and Mailed

nm/rvs