

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NYALUAK B TUT
Claimant

APPEAL NO. 09A-UI-10097-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS
Employer

**Original Claim: 05/31/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The claimant, Nyaluak Tut, filed an appeal from a decision dated June 29, 2009, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on August 4, 2009 and concluded on August 18, 2009. The claimant participated on her own behalf and Nyigeelo Gon acted as interpreter.

The employer provided a telephone number to the Appeals Section for the hearing on August 18, 2009. That number was dialed at 2:59 p.m. and the only response was a voice mail that was clearly identified as belonging to the designated witness. A message was left indicating the hearing would proceed without the employer's participation unless a representative contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 3:16 p.m., the employer had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

A disqualification decision was mailed to the claimant's last known address of record on June 29, 2009. The claimant did not receive the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by July 9, 2009. The appeal was not filed until July 14, 2009, which is after the date noticed on the decision. She had gone to the local Workforce Center to ask why she had not been getting unemployment and was told a decision had been issued disqualifying her. She filed the appeal at that time.

Nyaluak Tut was employed by Tyson from April 2006 until May 29, 2009 as a full-time line worker. She had sustained work-related injury in February 2008 and had been on light duty since that time.

On May 29, 2009, Ms. Tut was summoned to the office. When she arrived, Supervisor Randy told her she was being fired. The claimant believed she was being fired because of the injury she had sustained 15 months before and because the employer had received too many complaints from her doctor.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.6-2 provides in pertinent part:

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. . . . 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.

The claimant did not receive the decision and did not know an appeal needed to be filed. The appeal shall be accepted as timely.

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 to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case, the employer did not participate to provide any evidence of misconduct on the part of the claimant. The only evidence was supplied by the claimant, and her testimony does not establish any wrongdoing on her behalf.

DECISION:

The decision of the representative dated June 29, 2009, reference 01, is reversed. Nyaluak Tut is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw