

IOWA WORKFORCE DEVELOPMENT  
Unemployment Insurance Appeals Section  
1000 East Grand—Des Moines, Iowa 50319  
DECISION OF THE ADMINISTRATIVE LAW JUDGE  
68-0157 (7-97) – 3091078 - EI

VICTORIA BERASTAIN  
1706 BAKER AVE  
MUSCATINE IA 52761-1701

WEST LIBERTY FOODS LLC  
207 W 2<sup>ND</sup> ST  
PO BOX 318  
WEST LIBERTY IA 52776

Appeal Number: 06A-UI-05508-HT  
OC: 04/30/06 R: 04  
Claimant: Appellant (2)

**This Decision Shall Become Final**, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4<sup>th</sup> Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Victoria Berastain, filed an appeal from a decision dated May 16, 2006, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on June 13, 2006. The claimant participated on her own behalf. The employer, West Liberty Foods, participated by Human Resources Jamie Ruess. Exhibit One was admitted into the record.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Victoria Berastain was employed by West Liberty Foods from September 26, 2005 until April 27, 2006. She was a full-time production worker on

the second shift. During the course of her employment she received disciplinary action regarding poor work performance and violation of safety procedures. The final warning was given on April 18, 2006, when she was suspended for poor job performance and notified that her job was in jeopardy.

On April 26, 2006, an employee notified Operations Manager Martin Siever that the day before, the claimant had come in to the fry/freeze area, taken one of the "sleeves" used by workers in that area, tied off the end of it and put meatballs in it as they were coming out of the oven, then left. She did not have any job duties in that area of the facility. Mr. Siever investigated by talking with six workers in that area but only one other worker had seen the claimant do this.

The claimant was not interviewed prior to the decision to discharge, but asked about the situation at the time she had been summoned to the office by Human Resources Manager Jamie Ruess. She was only told that someone had seen her take the meatballs and she denied it and maintained she had not been out of her own work area.

The names of the witnesses were never revealed to her at the time of discharge or at the time of the hearing. These employees still work for West Liberty Foods but were not offered as witnesses for the hearing. At the time of discharge the claimant was only asked if she had "anything to say" but was not asked if she had anyone who could vouch for her having been in her own work area during the entire shift.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is not.

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 to establish the claimant was discharged for substantial, job-related misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The employer never revealed the names of the witnesses who allegedly saw the claimant take the meatballs nor was their direct testimony offered at the hearing. The administrative law judge cannot consider that the employer gave the claimant an adequate opportunity to present evidence in her favor prior to the discharge. Asking if she had "anything to say" after being told she was accused of stealing is not the same thing as interviewing her during the investigation and making a good-faith and diligent effort to have her side of the story and interview her witnesses prior to making the decision to discharge.

The employer's second-hand, hearsay testimony is inadequate to rebut the claimant's denial of wrong-doing. West Liberty Foods has failed to meet its burden of proof to establish the claimant was discharged for theft. Disqualification may not be imposed.

#### DECISION:

The representative's decision of May 16, 2006, reference 01, is reversed. Victoria Berastain is qualified for benefits, provided she is otherwise eligible.

bgh/kkf