

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

MILASHU K AWRIN
Claimant

SWIFT PORK COMPANY
Employer

APPEAL 18R-UI-07477-LJ-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/18/18
Claimant: Appellant (1)

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 April 2, 2018, (reference 01) unemployment insurance decision that denied benefits based upon a determination that claimant was discharged from employment for violation of a known company rule. The parties were properly notified of the hearing. A telephone hearing was held on June 7, 2018. The claimant, Milashu Arwin, participated. The employer, Swift Pork Company, participated through Emily Pottorff, Assistant HR Manager. Employer's Exhibits 1 through 12 were received and admitted into the record without objection. Kunama/English interpreter Antonio provided interpretation services for the hearing.

The administrative law judge issued a decision dated June 11, 2018, for Appeal Number 18A-UI-05184-LJ-T finding claimant was discharged for disqualifying job-related misconduct. Claimant appealed this decision to the Employment Appeal Board ("EAB"). On July 12, 2018, the EAB issued a decision for Hearing Number 18B-UI-05184 finding claimant did not appear for or participate in the hearing and remanding the matter for a new hearing. This EAB decision was issued in error. The claimant fully participated in the June 7 hearing with the assistance of a Kunama language interpreter. She was granted the opportunity to testify and to cross-examine the employer. There is no need to conduct another hearing on the merits and gather any additional testimony or documentary evidence, as the administrative law judge fully developed the record during the June 7 hearing. The administrative law judge now re-enters her decision setting forth the Findings of Fact and Reasoning and Conclusions of Law based on the record from the June 7, 2018, hearing.

ISSUE:

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, most recently as a general laborer, from August 31, 2016, until March 1, 2018, when she was discharged. On February 26, 2018, the employer received an email from

claimant's physical therapist reporting that claimant has not been compliant with her therapy. The therapist also reported that claimant had shown marked improvement, despite continuing to complain of pain. (Exhibit 6) Pottorff called claimant to Human Resources to counsel her about the issues with physical therapy. During that meeting, after Pottorff told claimant she was being discharged from physical therapy, claimant treated Pottorff with rudeness, aggression, and disrespect. She raised her voice and called the employer names in a language other than English. Claimant was suspended after that meeting and was subsequently discharged.

Claimant had been warned in the past for rudeness and yelling. On November 29, 2017, claimant was written up for behaving disrespectfully toward the work comp manager. (Exhibit 12) The action record documenting this discipline states claimant "was yelling at [the work comp manager] to the point that Ast. Safety mgr, Tyler Devic, had to call HR to come and get involved." On January 10, 2018, claimant was written up for failing to follow medical procedure. Claimant was scheduled for an appointment, but when she arrived, she refused to let the arranged interpreter translate for her. Claimant became aggressive and yelled at the employer, causing the employer to have to cancel the meeting. (Exhibit 11) This documentation states that claimant's behavior was unacceptable and will not be tolerated. (Exhibit 11) Claimant was made aware that her job would be in jeopardy for continued issues.

The unemployment insurance decision was mailed to the appellant's address of record on April 2, 2018. The appellant did not receive the decision until April 17, 2018, after the deadline to file an appeal had passed. Claimant attempted to file an appeal as soon as she received the decision, but the appeal did not go through. Claimant then went back to her local office and filed a second appeal on May 3, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for disqualifying misconduct. Benefits are withheld.

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 section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 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 section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for

benefits in cases involving section 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 section 96.8, subsection 5.

The appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was not received in a timely fashion. Without timely notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973). Additionally, claimant initially tried to appeal but that appeal was not received. Immediately upon receipt of information to that effect, a second appeal was filed. Therefore, the appeal shall be accepted as timely.

The second issue is whether claimant is entitled to benefits based on her separation from employment. Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). 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). When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Id.* Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. *Henry v. Iowa Dep't of Job Serv.*, 391 N.W.2d 731 (Iowa Ct. App. 1986).

In this case, claimant was discharged after behaving with disrespect toward the employer. Claimant had been warned about this issue on two prior occasions. The employer is entitled to maintain a work environment where employees do not yell at or disrespect management, and claimant was aware that her job was in jeopardy for further incidents of yelling and disrespect. The employer has established that claimant was discharged from employment due to disqualifying, job-related misconduct. Benefits are withheld.

DECISION:

The April 2, 2018, (reference 01) unemployment insurance decision is affirmed. Claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Elizabeth A. Johnson
Administrative Law Judge

Decision Dated and Mailed

lj/scn