

**IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**MAUREEN L MWEMBA**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL 24A-UI-03117-DZ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 02/18/24  
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

Tyson Fresh Meats Inc, the employer/appellant,<sup>1</sup> appealed the Iowa Workforce Development (IWD) March 13, 2024 (reference 01) unemployment insurance (UI) decision. IWD found Ms. Mwemba eligible for REGULAR (state) UI benefits because IWD concluded the employer dismissed her from employment on February 15, 2024 for a reason that did not disqualify her from receiving UI benefits. On March 22, 2024, the Iowa Department of Inspections, Appeals, and Licensing (DIAL), UI Appeals Bureau mailed a notice of hearing to the employer and Ms. Mwemba for a telephone hearing scheduled for April 10, 2024.

The administrative law judge held a telephone hearing on April 10, 2024. The employer participated in the hearing through Terry Carmichael, training manager. Ms. Mwemba participated in the hearing personally. The administrative law judge took official notice of the administrative record and admitted Employer's Exhibit 1 as evidence.

**ISSUES:**

Did the employer discharge Ms. Mwemba from employment for disqualifying job-related misconduct?

Did IWD overpay Ms. Mwemba UI benefits?

If so, should she repay the benefits?

**FINDINGS OF FACT:**

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue.<sup>2</sup> The administrative law judge may believe all, part or none of any witness's testimony.<sup>3</sup> In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations,

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<sup>1</sup> Appellant is the person or employer who appealed.

<sup>2</sup> *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007).

<sup>3</sup> *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996).

common sense and experience.<sup>4</sup> In determining the facts, and deciding what testimony to believe, the administrative law judge may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's conduct, age, intelligence, memory and knowledge of the facts; the witness's interest in the trial, and the witness's motive, candor, bias and prejudice.<sup>5</sup>

The following findings of fact show how the administrative law judge has resolved the disputed factual issues in this case. The administrative law judge assessed the credibility of the witnesses, considered the applicable factors listed above, and used his own common sense and experience.

Having reviewed the evidence in the record, the administrative law judge finds: Ms. Mwemba began working for the employer on May 30, 2006. She worked as a full-time interpreter. Her employment ended on February 16, 2024.

On Tuesday, February 13, 2024, Ms. Mwemba was at a laundromat in Perry, Iowa. Ms. Mwemba was not working. She was helping an African immigrant family who also worked for the employer do their laundry. Ms. Mwemba helped the family load their clothes in the several washing machines. Ms. Mwemba saw other Tyson employees at the laundromat and spoke with them. As they were talking, one of the Tyson employees (Employee A) swiped a Tyson card to pay for laundry in several washing machines, including the laundry of the family Ms. Mwemba was helping. Ms. Mwemba pointed to the washing machines with the family's laundry in it and told Employee A that those were her clothes. Ms. Mwemba said the clothes were hers because she did not want to have to explain to Employee A that she was helping the family during her off-duty time. Ms. Mwemba heard a laundromat employee call the employer and report that Employee A swiped the employer's card to pay for Ms. Mwemba's laundry. Ms. Mwemba did not know whether Employee A was on the clock or not. The laundromat employee sent Tyson a video of the interaction between Ms. Mwemba and Employee A. The video contained no audio.

The next day, Ms. Mwemba asked Employee A's manager if Employee A was on the clock the previous evening. The manager told Ms. Mwemba that Employee A was on the clock doing laundry for the employer. Ms. Mwemba told the manager about the interaction between Employee A and herself at the laundromat the previous evening.

The following day, the employer called Ms. Mwemba into the office. Ms. Mwemba explained that Employee A swiped the card to pay for her laundry, but she did not ask or direct Employee A to do so. The employer showed Ms. Mwemba the video the laundromat employee sent to the employer showing Ms. Mwemba pointing at washing machines. Ms. Mwemba denied stealing from the employer. The employer suspended Ms. Mwemba for stealing and told her that her job was in jeopardy. The employer also spoke with Employee A. Employee A stated that they accidentally swiped the employer's card to pay for Ms. Mwemba's laundry. The employer suspended Employee A.

On Friday, February 16, the employer terminated Ms. Mwemba's employment for stealing. Ms. Mwemba had no prior discipline record. The employer's policy prohibits theft and provides that the employer will terminate the employment of an employee who steals.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the employer discharged Ms. Mwemba from employment on February 16, 2024 for a reason that does not disqualify her from receiving UI benefits.

Iowa Code section 96.5(2)(a) and (d) provide, in relevant part:

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.

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is 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. Misconduct by an individual includes but is not limited to all of the following:

...

(13) Theft of an employer or coworker's funds or property

The employer has the burden of proof in establishing disqualifying job misconduct.<sup>6</sup> The issue is not whether the employer made a correct decision in separating the claimant from employment, but whether the claimant is entitled to unemployment insurance benefits.<sup>7</sup> Misconduct must be "substantial" to warrant a denial of job insurance benefits.<sup>8</sup>

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 of the employer's policy or rule 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.

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<sup>6</sup> *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

<sup>7</sup> *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

<sup>8</sup> *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

Theft is misconduct under the explicit statutory definition of misconduct. In addition, the Iowa Supreme Court has found a single attempted theft to be misconduct as a matter of law.<sup>9</sup> Even the theft of a small value item can be misconduct. The Iowa Court of Appeals has found an employee who took a wasted \$10.00 container of soup from a dumpster was disqualified for misconduct.

In this case, the employer has failed to establish misconduct on the part of Ms. Mwemba. Employee A swiped the employer's card to pay for the laundry of the family Ms. Mwemba was helping. Ms. Mwemba did not ask or direct Employee A to do so. Employee A even told the employer that they accidentally swiped the card. Still, the employer terminated Ms. Mwemba's employment on the basis that she stole from the employer. Based on the evidence in this case, the employer has failed to establish that what Ms. Mwemba did was disqualifying, job-related misconduct. Ms. Mwemba is eligible for UI benefits.

Since Ms. Mwemba is eligible for REGULAR (state) UI benefits per this decision, the issues of overpayment and repayment are moot. An issue being moot means there is nothing left to decide.<sup>10</sup>

**DECISION:**

The March 13, 2024, (reference 01) UI decision is AFFIRMED. The employer discharged Ms. Mwemba from employment on February 16, 2024 for a reason that does not disqualify her from receiving UI benefits. Ms. Mwemba is eligible for UI benefits, as long as no other decision denies her UI benefits.



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Daniel Zeno  
Administrative Law Judge

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April 12, 2024  
Decision Dated and Mailed

DZ/jkb

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<sup>9</sup> *Ringland Johnson Inc. v. Employment Appeal Board*, 585 N.W.2d 269 (Iowa 1998).

<sup>10</sup> *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 442 (Iowa 1983).

**APPEAL RIGHTS.** If you disagree with this decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
6200 Park Avenue Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

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.

**AN APPEAL TO THE BOARD SHALL 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.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf> or by contacting the District Court Clerk of Court <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or 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.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
6200 Park Avenue Suite 100  
Des Moines, Iowa 50321  
Fax: (515)281-7191  
En línea: eab.iowa.gov**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que se encuentra en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf> o comunicándose con el Tribunal de Distrito Secretario del tribunal <https://www.iowacourts.gov/iowa-courts/court-directory/>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.