

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUL A YUSUF
Claimant

APPEAL NO. 13A-UI-00249-S2T

**ADMINISTRATIVE LAW JUDGE
AMENDED DECISION**

AGRI STAR MEAT & POULTRY
Employer

**OC: 12/02/12
Claimant: Appellant (2)**

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

STATEMENT OF THE CASE:

Lul Yusuf (claimant) appealed a representative's December 28, 2012 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because he voluntarily quit work with Agri Star Meat & Poultry (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for March 4, 2013. The claimant participated personally through interpreter, Ibrahim Abukar. The employer participated by Laura Roney, Payroll Human Resources Assistant. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 9, 2011, as a full-time general laborer. The claimant signed for receipt of the employer's handbook on August 9, 2011. The green hat told the claimant that she was allowed a 10 to 12-minute prayer break according to the prayer schedule each day.

On July 12, 2012, the employer issued the claimant a written warning for taking a 40-minute unscheduled break. The employer notified the claimant that further infractions could result in termination from employment. The claimant disputed the warning because the green hat authorized the break for prayer time and the claimant only took a 10 to 12-minute break. On August 6, 2012, the employer issued the claimant a written warning for taking a 35-minute break. The employer notified the claimant that further infractions would result in termination from employment. The claimant disputed the warning because the green hat authorized the break for prayer time and the claimant again only took a 10 to 12-minute break. Both times the green hat nodded to the claimant that it was authorized for her to take the break for prayer but

when the claimant returned the green hat would exaggerate the amount of time the claimant was gone and report the infraction.

On December 3, 2012, the claimant took a 10 to 12-minute prayer break. The green hat reported it as a 15-minute unscheduled break. The employer terminated the claimant on December 3, 2012.

A decision was mailed to the claimant's address of record on December 28, 2012. The claimant did not receive the decision until the date it was due on January 7, 2013. The claimant filed her appeal as soon as she could on January 9, 2013.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 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 claimant did not have an opportunity to appeal the fact-finder's decision because the decision was not received until the day it was due. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. The administrative law judge concludes she was 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 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 had the power to present testimony but did not do so. The employer did not provide first-hand testimony at the hearing and, therefore, did not provide sufficient eye witness evidence of job-related misconduct to rebut the claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's December 28, 2012 decision (reference 01) is reversed. The claimant's appeal is timely. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs