

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**THAWNG L TUNG**  
Claimant

**TYSON FRESH MEATS INC**  
Employer

**APPEAL 18A-UI-06682-SC-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/06/18**  
**Claimant: Appellant (1)**

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Iowa Code § 96.6(2) – Timeliness of Appeal  
Iowa Code § 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Thawng L. Tung (claimant) filed an appeal from the June 4, 2018, reference 01, unemployment insurance decision that denied benefits based upon the determination Tyson Fresh Meats, Inc. (employer) discharged him for violation of a known company policy. The parties were properly notified about the hearing. A telephone hearing was held on July 6, 2018. The claimant participated. The employer participated through HR Administrative Associate Mehdina Kurtovic. Burmese interpretation was provided by Stanley (employee number 6328) and Manuel (employee number 6583) from CTS Language Link. The Department's Exhibits D1 and D2 were admitted into the record.

**ISSUES:**

Is the appeal timely?

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: The claimant was employed full-time as a Production Associate beginning on June 20, 2016, and was separated from employment on March 13, 2018, when he was discharged. The employer has an anti-harassment and discrimination policy and, if an employee violates that policy, he or she may be subject to discharge. The claimant was aware of the employer's policy.

On March 9, 2018, the claimant's co-worker was 15 minutes late to work. The claimant questioned her about it and patted her thighs. He believed he was playing around and teasing her as he had in the past. She had previously told him not to touch her. The claimant knew his conduct was a violation of the employer's policy and his job would be in jeopardy if she reported it to management.

The claimant's co-worker reported the incident to Human Resources who conducted an investigation into the claimant's conduct. The claimant admitted to the investigator that he

violated the employer's policy when he touched his co-worker's thighs. The claimant was discharged for his conduct.

The unemployment insurance decision was mailed to the appellant's address of record on June 4, 2018. It contained a warning that an appeal must be filed by June 14, 2018. The appellant received the decision within a week of mailing but he does not read English and the decision was mailed to him in English. Burmese is not a language that is offered for translation on the back of the decision. The claimant, with the assistance of a friend, went to the Iowa Workforce Development office on June 19, 2018 to ask why he was not receiving benefits. He appealed the decision at that time.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes the claimant's appeal is timely and he was discharged from employment due to job-related misconduct. Benefits are denied.

Iowa Code section 96.6(2) provides, in pertinent part:

Filing – determination – appeal.

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 appellant did not have an opportunity to appeal the unemployment insurance decision because the decision was mailed in a language he does not understand. He was not on notice that he was disqualified. Without 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). The appellant filed the appeal the same day he learned he was disqualified. Therefore, the appeal shall be accepted as timely.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. *Id.* Iowa Administrative Code rule 871-24.32(1)a provides:

"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).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). 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). 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).

The employer has an interest in maintaining a harassment free work place for its employees. The claimant acknowledged he physically touched his co-worker in violation of the employer's policy. The claimant's conduct was a deliberate disregard of the employer's interest and a violation of the reasonable conduct an employer has to expect of an employee. It is disqualifying without prior warning. Benefits are denied.

**DECISION:**

The claimant's appeal is timely. The June 4, 2018, reference 01, unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

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Stephanie R. Callahan  
Administrative Law Judge

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Decision Dated and Mailed

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