

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

MARISSA M JOHNSON
Claimant

WESTAR FOODS INC
Employer

**APPEAL 23A-UI-00741-DZ-T
ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 12/18/22
Claimant: Appellant (1)**

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

STATEMENT OF THE CASE:

Marissa M. Johnson, the claimant/appellant, filed an appeal from the Iowa Workforce Development January 11, 2023 (reference 01) unemployment insurance (UI) decision. The decision denied Ms. Johnson REGULAR (state) UI benefits because IWD concluded that the employer had discharged Ms. Johnson from work on December 8, 2022 for insubordination. The Iowa Department of Inspections and Appeals UI Appeals Bureau mailed notices of hearing to Ms. Johnson and IWD. A telephone hearing was held on February 9, 2023. Ms. Johnson participated personally. The employer participated through Cindy Kelchen, training manager/district manager, Dwayne Sorensen, cook, and Tim Speir, Unemployment Insurance Services hearing representative. The administrative law judge took official notice of the administrative record and admitted Employer's Exhibit 1.

ISSUES:

Is. Ms. Johnson's appeal filed on time?
Did the employer discharge Ms. Johnson from employment for disqualifying, job-related misconduct?

FINDINGS OF FACT:

Having reviewed the evidence in the record, the administrative law judge finds: IWD mailed the January 11, 2023, (reference 01) UI decision to Ms. Johnson at the correct address on January 11, 2023. The UI decision states that it becomes final unless an appeal is postmarked or received by the IWD Appeals Section by Saturday, January 21, 2023. If the appeal deadline falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next working day. January 21, 2023 was a Saturday. So, the appeal deadline was extended to Monday, January 23, 2023.

Ms. Johnson received the decision in the mail on Monday, January 16. Ms. Johnson was on bed rest, on advice of her doctor, and had been since early January 2023. Ms. Johnson was on bed rest because she was miscarrying her pregnancy. Ms. Johnson was not in the hospital, but she was not feeling well January 16-23. Ms. Johnson felt better as of Tuesday, January 24.

Ms. Johnson filed an appeal online on Tuesday, January 24, 2023. The appeal was received on January 24, 2023.

The administrative law judge further finds: Ms. Johnson began working for the employer, Hardee's restaurant, on March 30, 2022. She worked as a full-time shift lead. Her employment ended on December 8, 2022.

On December 8, 2022, Ms. Johnson brought doughnuts to work as an appreciation for the employees who worked with her. Ms. Johnson put the doughnuts on the front counter because she had lots of things in her hand. Ms. Johnson planned to bring the donuts to the office at some point.

Ms. Kelchen, Ms. Johnson's direct supervisor, saw the doughnuts and learned from another employee Ms. Johnson had brought them in. Ms. Kelchen told Ms. Johnson that she could not bring in food not sold by the employer and put that food on the front counter. During the summer of 2022 and again in November 2022, the employer had reminded all employees that they were not allowed to bring outside food to work and have it visible to customers. The employer told employees that they could bring outside food for personal meals, but the outside food could not be visible to customers. Ms. Johnson asked Ms. Kelchen several times if she could no longer bring outside food to work. Ms. Kelchen told Ms. Johnson to remove the doughnuts from the front counter. Ms. Kelchen also told Ms. Johnson that employees are not allowed to bring outside food to work and have it visible to customers. Ms. Johnson persisted in asking if she could bring outside food to work. Eventually, Ms. Kelchen told Ms. Johnson to clock out and go home for the day. Ms. Johnson said she could not afford to not work that day. Ms. Johnson also told Ms. Kelchen that Ms. Kelchen could not make Ms. Johnson clock out. Ms. Kelchen repeated that Ms. Johnson should clock out. Ms. Johnson continued to not do so. Ms. Kelchen told Ms. Johnson that if Ms. Johnson did not clock out, Ms. Kelchen would clock out Ms. Johnson. Ms. Johnson clocked out.

As she clocked out, Ms. Johnson asked Ms. Kelchen if Ms. Kelchen had fired her. Ms. Kelchen told Ms. Johnson that they would discuss the matter later. At that point, Ms. Kelchen was stepping in and doing Ms. Johnson's job. Ms. Johnson continued to ask Ms. Kelchen if she was fired and arguing with Ms. Kelchen about whether she could bring outside food to work. Ms. Kelchen repeated at least three more times that they would discuss the matter later. Customers were present and could see and hear the interaction between Ms. Kelchen and Ms. Johnson. At some point, Ms. Kelchen told Ms. Johnson that if Ms. Johnson persisted the employer would end her employment. Ms. Johnson persisted in asking her questions and arguing with Ms. Kelchen.

The employer's policy prohibits "Insubordination; refusing to follow management directives or other disrespectful conduct to a supervisor."¹ Ms. Johnson acknowledged receiving a copy of the policy on her hire date. Eventually, Ms. Kelchen told Ms. Johnson that her employment was over. Ms. Johnson had no other discipline on her record.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes Ms. Johnson's appeal of the January 11, 2023 (reference 01) UI decision was filed on time.

¹ Employer's Exhibit 1

Iowa Code § 96.6(2) provides, in pertinent part: “[u]nless 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.”

Iowa Admin. Code r. 871-24.35(1) provides:

2. Except as otherwise provided by statute or by division rule, any payment, appeal, application, request, notice, objection, petition, report or other information or document submitted to the division shall be considered received by and filed with the division:

(2) If transmitted via the United States Postal Service on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.

(b) If transmitted via the State Identification Data Exchange System (SIDES), maintained by the United States Department of Labor, on the date it was submitted to SIDES.

(c) If transmitted by any means other than [United States Postal Service or the State Identification Data Exchange System (SIDES)], on the date it is received by the division.

Iowa Admin. Code r. 871-24.35(2) provides:

2. The submission of any payment, appeal, application, request, notice, objection, petition, report or other information or document not within the specified statutory or regulatory period shall be considered timely if it is established to the satisfaction of the division that the delay in submission was due to division error or misinformation or to delay or other action of the United States postal service.

The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed.² Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid.³

Ms. Johnson received the January 11, 2023 (reference 01) UI decision before the appeal deadline and, therefore, could have filed an appeal by the deadline. The notice provision of the decision was valid. But Ms. Johnson has established good cause for why she filed her appeal after the deadline. Ms. Johnson was on bed rest, on advice of her doctor, and not feeling well due to her miscarrying her pregnancy. As soon as she felt better, Ms. Johnson filed her appeal. Ms. Johnson's appeal was filed on time.

The administrative law judge further concludes the employer discharged Ms. Johnson from employment for job-related misconduct.

² *Franklin v. IDJS*, 277 N.W.2d 877, 881 (Iowa 1979).

³ *Beardslee v. IDJS*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott* 319 N.W.2d 244, 247 (Iowa 1982).

Iowa Code section 96.5(2)(a) and (d) provide:

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 such 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.

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.

The Iowa Supreme Court has held that this definition accurately reflects the intent of the legislature.⁴

The employer has the burden of proof in establishing disqualifying job misconduct.⁵ The issue is not whether the employer made a correct decision in separating the claimant from

⁴ *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

⁵ *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

employment, but whether the claimant is entitled to unemployment insurance benefits.⁶ Misconduct must be “substantial” to warrant a denial of job insurance benefits.⁷

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Ms. Johnson was insubordinate when she continued to argue with Ms. Kelchen, even after Ms. Johnson clocked out, and despite Ms. Kelchen telling Ms. Johnson multiple times that now was not the time to talk about the issues in front of customers. Ms. Kelchen tried to deescalate the situation, but Ms. Johnson would not let it go. The employer has established disqualifying, job-related misconduct. The misconduct the employer has established that led to the employer terminating Ms. Johnson’s employment is not that she brought outside food to work, or that she put the doughnuts on the front counter. It is that Ms. Johnson refused to follow Ms. Kelchen’s directive to not talk about the issue at that time in front of customers. Since the employer has established disqualifying, job-related misconduct, benefits are denied.

DECISION:

Ms. Johnson’s appeal of the January 11, 2023 (reference 01) UI decision was filed on time. The January 11, 2023 (reference 01) UI decision denying Ms. Johnson REGULAR (state) UI benefits is AFFIRMED. The employer discharged Ms. Johnson from employment for 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 UI benefit amount, as long as no other decision denies her UI benefits.



Daniel Zeno
Administrative Law Judge

February 14, 2023
Decision Dated and Mailed

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⁶ *Infante v. Iowa Dep’t of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984).

⁷ *Newman v. Iowa Dep’t of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984).

APPEAL RIGHTS. If you disagree with the 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
4th Floor – Lucas Building
Des Moines, Iowa 50319
Fax: (515)281-7191
Online: 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
4th Floor – Lucas Building
Des Moines, Iowa 50319
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 adquiriera 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.