

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**FEDERICO OROPEZA CASILLAS**  
Claimant

**SMITHFIELD FARMLAND CORP**  
Employer

**APPEAL 17A-UI-09176-JP-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 08/06/17**  
**Claimant: Appellant (2R)**

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

**STATEMENT OF THE CASE:**

The claimant filed an appeal from the August 23, 2017, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call on September 26, 2017. Claimant participated. CTS Language Link interpreter ID number 10889 interpreted on claimant's behalf. Employer participated through human resources assistant manager Rebecca Jackson. Employer Exhibit 1 was admitted into evidence with no objection.

**ISSUE:**

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: An ineligibility unemployment insurance decision was mailed to claimant's last known address of record on August 23, 2017. Claimant received the decision, but he does not remember the exact day because he had to go to Mexico for his sick mother. Claimant left the country on August 20 or 21, 2017, to go get his mother and returned to his address of record on September 1, 2017. Claimant retrieved his mail, including the unemployment insurance decision denying him benefits, on Friday, September 1, 2017, which was within the appeal period. On September 1, 2017, claimant's friend informed him that he had been denied benefits. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by September 2, 2017; however, September 2, 2017 was a Saturday, September 3, 2017 was a Sunday, and September 4, 2017 was a holiday, therefore claimant had until September 5, 2017 to file his appeal. Claimant went to his local office in Denison, Iowa on September 5, 2017, but they were at lunch. When claimant came back on September 5, 2017, the IWD employee that spoke Spanish was not present. Claimant left the local office and came back the local office the next day (September 6, 2017). Claimant then

filed his appeal on September 6, 2017, which was after the date noticed on the unemployment insurance decision.

The employer has a written policy that prohibits theft of company time. Claimant was aware of the policy.

The final incident that led to claimant's discharge occurred on July 15, 2017. Claimant clocked into work at 1:55 p.m. on July 15, 2017. Employer Exhibit 1. Antonio Duenas, claimant's co-worker, observed him clocking in. Employer Exhibit 1. Ms. Jackson testified that after claimant clocked in, no employees saw him the remainder of his shift. Employer Exhibit 1. On July 15, 2017, claimant and the other employees could not do anything for multiple hours because they had to wait for the mechanics to fix the machines. Claimant did not interact with any other employees. Claimant clocked out at 1:28 a.m. Employer Exhibit 1. Two other employees clocked out at 1:29 a.m. and they did not see claimant. Employer Exhibit 1.

On July 18, 2017, a supervisor discovered that claimant had clocked in but did not recall claimant having worked. The employer conducted an investigation to determine if claimant had worked. On July 19, 2017, the employer spoke to claimant about the incident. Claimant told the employer he did work on July 15, 2017. On July 20, 2017, the employer met with claimant again. Claimant told the employer he was cleaning up the floor. Claimant told the employer he could observe a couple employees. Claimant told the employer that he did not go to the cafeteria to eat, but he was in the locker room. Claimant told the employer he left a different way. The employer told claimant he was being suspended pending an investigation. The employer continued its investigation and obtained statements from the employees in the rendering area and looked at the employee punch cards for that day. Ms. Jackson testified that the employer was not able to find any employees that observed claimant after he clocked in. On August 1, 2017, the employer discharged claimant for theft of company time.

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

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 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, subsections 10 and 11, 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.

Although claimant did not file his appeal until September 6, 2017, which was after the appeal period, he attempted to file his appeal on September 5, 2017 at his local IWD office, but the employee that speaks Spanish was not present to help him file his appeal. Claimant then returned the next day (September 6, 2017) and filed his appeal. Claimant's delay was due to the IWD employee that speaks Spanish not being present when he first attempted to file his appeal. Therefore, the appeal shall be accepted as timely.

The next issue is whether claimant was discharged for disqualifying job-related misconduct. For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason. Benefits are allowed.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *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). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

An employer is entitled to expect its employees to report to work as scheduled or to be notified when and why the employee is unable to report to work. On August 1, 2017, the employer discharged claimant for theft of company time on July 15, 2017. The parties agree that claimant reported for work on July 15, 2017 when he clocked in at 1:55 p.m. Employer Exhibit 1. The parties also agree that a coworker, Antonio Duenas, observed claimant clocking in on 1:55 p.m. Employer Exhibit 1. Claimant provided direct, first-hand testimony that on July 15, 2017, he and the other employees could not do anything for multiple hours because they had to wait for the mechanics to fix the machines. Claimant provided direct, first-hand testimony that he did not interact with any other employees. The parties agree that claimant left (clocked out) around 1:28 a.m. Employer Exhibit 1.

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). 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. 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 from claimant's supervisor or other employees that were working on July 15, 2017, but it elected to rely on Ms.

Jackson's testimony from their statements. Ms. Jackson's testimony as to what other employees told the employer does not carry as much weight as live testimony because live testimony is under oath and the witness can be questioned. 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 claimant's denial of said conduct. The employer did not meet its burden of proof to show misconduct. Benefits are allowed.

**DECISION:**

The August 23, 2017, (reference 01) unemployment insurance decision is reversed. Claimant's appeal is considered timely. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible. Any benefits claimed and withheld on this basis shall be paid.

**REMAND:** The issue of whether claimant was able to and available for work from August 20, 2017 through September 2, 2017, as delineated in the findings of fact is remanded to the Benefits Bureau of Iowa Workforce Development for a fact-finding interview and unemployment insurance decision.

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Jeremy Peterson  
Administrative Law Judge

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Decision Dated and Mailed

jp/rvs