IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JANTY NAMELE
717 E 5TH ST APT 5
DES MOINES IA 50309

TYSON FRESH MEATS INC
C/O TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06O-UI-02864-JT
OC: 11/27/05 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

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.

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.

YOU MAY REPRESENT yourself in this appeal or you may 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. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the January 4, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on April 14, 2006. Claimant Janty Namele participated with the assistance of Arabic-English interpreter Magby Salama. Employment Manager Tom Barragan represented Tyson. Exhibits One through Four and A were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Janty Namele was employed by Tyson Fresh Meats as a full-time production worker from May 19, 2003 until November 14, 2005, when the employer suspended her. The employer formally terminated Ms. Namele's employment on November 25, 2005. Prior to November 10,

Ms. Namele suffered a workplace injury to her foot. On November 10, Ms. Namele appeared for work, but was unable to climb the stairs to reach the time clock. In order to clock in and out of work, Ms. Namele had to swipe her badge through a slot in the time clock. Ms. Namele's sister also worked at the plant and Ms. Namele had her sister swipe her badge through the time clock. Ms. Namele expected to receive her badge back from her sister during her shift. Ms. Namele had given no additional instructions to her sister. Ms. Namele had not asked her sister or anyone else to clock her out. Shortly after Ms. Namele commenced her shift, she had to leave work to care for a sick or injured child. In Ms. Namele's absence, a coworker used Ms. Namele's badge to clock her out at the end of the normal shift. On November 14, Training Coordinator Mike Cleaver and Plant Superintendent Bud Hensley interviewed Ms. Namele regarding a violation of the employer's policy regarding use of time cards and payroll theft. Ms. Namele explained what had happened as best she could. Ms. Namele has limited English skills. Mr. Hensley suspended Ms. Namele until the next working day, pending further investigation. Ms. Namele reported back to Mr. Hensley as directed and was told the employer had not yet reached a decision regarding whether she would be allowed to continue in the employment. Mr. Hensley told Ms. Namele to go home and wait for a telephone call from the employer. Ms. Namele never received a telephone call from Mr. Hensley and concluded she had been discharged from the employment.

To complicate matters, Ms. Namele was receiving evaluation and/or treatment regarding her workplace injury at the time she was suspended from the employment and had been engaged in a discussion with the employer's nursing department regarding her need for a ride to the doctor. This matter, combined with the language barrier, further confused Ms. Namele regarding what was expected of her.

REASONING AND CONCLUSIONS OF LAW:

The employer asserts that Ms. Namele voluntarily quit the employment by failing to appear for a meeting on November 18, 2005. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25. The evidence in the record fails to establish that Ms. Namele formed an intent to sever the employment relationship. The weight of the evidence indicates that Ms. Namele did not quit, but was discharged from the employment.

The question, therefore, is whether the evidence in the record establishes that Ms. Namele was discharged for misconduct in connection with the employment. It does 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992). 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. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The evidence in the record indicates that Ms. Namele asked her sister, out of necessity, to clock her in for her shift on November 10. The evidence indicates that the employer was aware of Ms. Namele's temporary disability, but provided her with no instruction regarding the appropriate clock-in procedure during her disability. The evidence fails to establish that Ms. Namele asked her sister or anyone else to clock her out and that a coworker acted on his or her own initiative in doing so.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Namele was discharged for no disqualifying reason. Accordingly, Ms. Namele is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Namele.

DECISION:

The Agency representative's decision dated January 4, 2006, reference 01, is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kkf