

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

AKWOL D ROLL

Claimant,

and

SWIFT & COMPANY

Employer.

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HEARING NUMBER: 10B-EUCU-00391

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2A

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

STATEMENT OF THE CASE:

The issue of timeliness was raised when the claimant filed an appeal dated January 14, 2010 that was faxed to the Employment Appeal Board on April 8, 2010, over two months beyond the statutory deadline of January 27, 2010. The reason for the delay was because the claimant originally hand-delivered the appeal to Iowa Workforce Development Center, Appeals Section back in January. For this reason, we find good cause has been established for the late appeal, and the board shall consider it to be timely.

The claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Akwol Roll, was employed by Swift & Co. from December 15, 2008 through as a full-time production worker on the second shift ham boning. (Tr. 6-7,) On July 15th, the employer called the claimant into the office because she refused to follow her supervisor's directive. (Tr. 7-8, 11) The employer has a company policy that provides "...refusal of any employee to carry out the reasonable request of manager to perform as directed...failing to follow supervisor's direction...manager reserves the right to [reprimand]...up to and including discharge." (Tr. 8)

The claimant had no problem with work. In fact, Ms. Roll had a very good employment record (Tr. 17), as she had no prior issues or warnings about following her supervisor's directives. (Tr. 9, 12-13) She was experiencing difficulty with her supervisor because "...whatever hours [she worked, her supervisor was] not recording [her] right on the time sheet and [she's] not getting paid exact hours [she worked]." (Tr. 12)

While she was in the office, a union steward and interpreter who did not accurately speak her native tongue, were present. (Tr. 13-14) During that meeting, she believed the parties were laughing at her. (Tr. 14) Javiar Sanchez, the assistant Human Resources manager terminated her. (Tr. 7) The union did not follow up on the claimant's case. (Tr. 16)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2009) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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 accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993)).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The employer discharged the claimant for allegedly refusing to work. However, the claimant denies that she refused to work testifying that she had never had problems with performing work or following directions. (Tr. 9, 12-13, 17) The employer corroborates her testimony that she had never received any prior warnings for similar alleged behavior. (Tr. 9) Ms. Roll's firsthand testimony that she did not refuse work is more credible than the employer's hearsay testimony. While hearsay evidence is generally admissible in administrative proceedings and may constitute substantial evidence to uphold a decision of an administrative agency (Gaskey v. Iowa Dept. of Transportation, 537 N.W.2d 695 (Iowa 1995)), whether or not hearsay, an agency must have based its findings "upon the kind of evidence on which reasonably prudent persons are accustomed to rely on for the conduct of their serious affairs and may be based upon such evidence even if it would be inadmissible in a jury trial". Iowa Code Section 17A.14(1); see also, McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982).

The fact that both parties agree that Ms. Roll never had any prior warnings is indicative that even if the employer's allegation was true, we would consider it an isolated instance of poor judgment. The employer failed to provide any documentation, her supervisor, etc. to substantiate its claim.

871 IAC 24.32(4) provides:

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 this context, her single instance of insubordination would not rise to the legal definition of misconduct for unemployment insurance purposes. We note that Ms. Roll's testimony that she was not paid for services rendered was not refuted. (Tr. 12) And while she should not take matters into her own hands, it is understandable how she might have had a disagreement with her supervisor that led to her being called into the office in the first place. Again, at worst, this was an isolated instance of poor judgment. Be that as it may, it is the employer's burden to prove by a preponderance of the evidence that the final act was disqualifying. Based on this record, we attribute more weight to the claimant's version of events and conclude that her incident that led to her separation was not a disqualifying event.

DECISION:

The administrative law judge's decision dated January 12, 2010 is **REVERSED**. The claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided he is otherwise eligible.

John A. Peno

Elizabeth L. Seiser

AMG/ss