

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

MOHAMED ZAHIR
Claimant

APPEAL NO. 10A-UI-08181-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SWIFT & COMPANY
Employer

OC: 12/13/09
Claimant: Respondent (1)

Section 96.5(2)a – Discharge
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

The employer, Swift, filed an appeal from a decision dated January 11, 2010, reference 01. The decision allowed benefits to the claimant, Mohamed Zahir. After due notice was issued a hearing was held by telephone conference call on July 26, 2010. The claimant participated on his own behalf, Khalid Ghazal and Magdy Salama acted as interpreters. The employer participated by Employment Manager Jenny Mora. Exhibit D-1 was admitted into the record.

ISSUE:

The issue is whether the appeal is timely and whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

A disqualification decision was mailed to the employer's last-known address of record on January 11, 2010. The employer received the decision. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by January 21, 2010. The appeal was not filed until June 7, 2010, which is after the date noticed on the decision. The employer filed an appeal dated January 21, 2010, but it was not received by the Appeals Section. The employer protested the first quarter 2010 statement of charges which was mailed on May 7, 2010.

Mohamed Zahir was employed by Swift from November 20, 2006 until November 27, 2009 as a full-time production worker. On November 24, 2009, he was reported to have been trying to fix a band saw he was not qualified to repair and also had not turned off the power source or locked out the power source as required by the employer's safety policy.

His supervisor and another employee both told him to stop but allegedly he did not. He was suspended by Javier Sanchez pending investigation. He denied he was doing anything with the band saw except using the measuring guide. The other two employees asserted he was "inside" the saw without observing the correct safety procedures.

After the investigation Mr. Sanchez discharged the claimant for violation of the lock out/tag out safety procedure.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.6-2 provides in pertinent part:

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 employer did file a timely appeal but it was not received by the Appeals Section. An appeal was then made from the first quarter 2010 statement of charges within 30 days. This appeal was timely and it shall be allowed.

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.

The employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The employer in the present case did not present any eyewitness testimony even though the claimant's former supervisor is still employed and was present in the facility on the day of the hearing. 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 administrative law judge concludes that the hearsay evidence provided by the employer is not more persuasive than the claimant's denial of such conduct. The employer has not carried its burden of proof to establish that the claimant committed any act of misconduct in connection with employment for which he was discharged. Misconduct has not been established. The claimant is allowed unemployment insurance benefits.

DECISION:

The decision of the representative dated January 11, 2010, reference 01, is affirmed. Mohamed Zahir is qualified for benefits, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs