

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

MUOI D PHAM
720 SUPERIOR ST
STORM LAKE IA 50588

TYSON FRESH MEATS INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 060-UI-04084-RT
OC: 01/01/06 R: 01
Claimant: Appellant (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:

The claimant, Muoi D. Pham, filed an appeal from an unemployment insurance decision dated January 19, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 3, 2006, with the claimant participating. The claimant was assisted by an interpreter, Phung Nguyen. Will Sager, Human Resources Manager for the employer's complex in Storm Lake, Iowa, and Lori Molan, Retrim Supervisor, participated in the hearing for the employer, Tyson Fresh Meats, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

An initial hearing was held in this matter on February 21, 2006, with both the claimant and the employer participating. By decision dated February 18, 2006, the administrative law judge who conducted that hearing issued a decision affirming the representative's decision and denying benefits to the claimant because the claimant's appeal was not timely and he had not demonstrated good cause for a delay. The claimant appealed this decision to the Employment Appeal Board. By decision dated April 10, 2006, the Employment Appeal Board vacated the decision by the administrative law judge and remanded this matter for a decision on the merits and perhaps another hearing. The administrative law judge concluded that another hearing was necessary on the merits and conducted the hearing on May 3, 2006 after due notices to the parties.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time production worker from December 10, 1997, until he was discharged on December 30, 2005. The claimant was discharged for refusing to follow the instructions of his supervisor. On December 29, 2005, the claimant's supervisor, Lori Molan, Retrim Supervisor and one of the employer's witnesses, told the claimant to do another job for which he was qualified and which he had done before. The claimant refused. The claimant was directed by Ms. Molan to go to the retrim office which he did. The claimant again refused to do the job. The claimant was then taken to the office of the plant superintendent, Joel Graybill, where again the claimant refused even after being told that his job was in jeopardy. The claimant was provided the assistance of an interpreter. The claimant was then sent home and was called back the next day, December 30, 2005 and discharged for refusing to follow instructions.

The claimant testified that he refused the other job because he thought it paid \$.20 less than he was making but actually the job that the claimant refused paid more. The claimant was informed that the job paid more and seemed to understand that but the claimant now claims otherwise. The claimant was given several verbal warnings about refusing work which he was asked to do. On one occasion, he was taken to the office of Will Sager, Human Resources Manager for the Storm Lake, Iowa, complex where the claimant was employed, and one of the employer's witnesses, and warned that he could not refuse to do work. At that time the claimant had agreed to do the work and did so. The claimant also received other verbal warnings from Ms. Molan for the same thing. The employer does not permit an employee to "own" a job so that an employee can refuse to do other tasks as assigned by the employer.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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 parties agree, and the administrative law judge concludes, that the claimant was discharged on December 30, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. All the parties agree that the claimant refused to do work as instructed and as assigned by his supervisor on December 29, 2005. The claimant was given three opportunities to do the job and refused each time and was then sent home one day and discharged the next. The claimant testified that he refused the job because it paid \$.20 less than he usually earned. However, the two employer's witnesses credibly testified that the job actually paid more and they explained this to the claimant and the claimant seemed to understand. On the evidence here, the administrative law judge is constrained to conclude that the claimant deliberately refused to do a job after being told that it paid more than what he was usually making. The claimant's testimony to the contrary is not credible. The claimant testified that he had never received any warning for this behavior but conceded later upon cross-examination that at least on one occasion he had gone into the office of the employer's witness, Will Sager, Human Resources Manager for the employer's complex in Storm Lake, Iowa, where the claimant was employed, about the same thing or at least about the pay of certain work. Lori Molan, Retrim Supervisor and the other employer's witness, credibly testified that she had given the claimant additional verbal warnings for refusing to do work. The administrative law judge must conclude here that after verbal warnings, the claimant persisted in refusing to do a job as assigned by the employer on December 29, 2005 and that this refusal was a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct.

The claimant testified that he refused the job because it paid \$.20 per hour less. The evidence does not establish this but even if the job had paid that little less, the administrative law judge does not believe that the claimant was justified in refusing to do the job. The claimant had been warned about his refusals in the past. The evidence establishes that an employee does not "own" a job so that he can refuse to do other jobs as instructed. The employer has policies that provide for discharge for insubordination when one refuses to do work even without a warning.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

DECISION:

The representative's decision of January 19, 2006, reference 01, is affirmed. The claimant, Muoi D. Pham, is not entitled to receive unemployment insurance benefits, until, or unless, he requalifies for such benefits, because he was discharged for disqualifying misconduct.

cs/tjc