IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

FLOR DE MARIA OCHOA DE YAC
Claimant

GLOBAL FOODS PROCESSING INC
Employer

APPEAL NO: 18A-UI-11368-JC-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/14/18
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant filed an appeal from the November 9, 2018, (reference 01) unemployment insurance decision that denied benefits based on her separation with this employer. The parties were properly notified about the hearing. A telephone hearing was held on December 7, 2018. The claimant participated personally and with a Spanish interpreter, (Ramina, #11655) at CTS Language Link. The employer participated through Brenda Ruhrer, human resources manager. Juana Zermeno also attended. The hearing was continued without testimony to December 12, 2018 because the claimant needed the proposed Employer Exhibits translated for her.

On December 12, 2018, a second telephone hearing was conducted with Administrative Law Judge, Jennifer Beckman. The claimant participated personally and with a Spanish interpreter, (Pat, #20895) at CTS Language Link. The employer participated through Brenda Ruhrer, human resources manager. Juana Zermeno also attended.

The administrative law judge took official notice of the administrative records including the fact-finding documents and the reference 01 initial decision. Claimant Exhibit A and Employer Exhibits 1-4 were received into evidence. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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: The claimant was employed full-time as a production worker since 2006 and was separated from employment on October 11, 2018, when she was discharged for failure to maintain sanitary conditions.

The employer is a fresh pork facility and as such, must comply with USDA regulations, which require extra precautions be followed for health and sanitation purposes. The employer states that failure to maintain sanitary conditions, which can result in deliberate contamination of product and work conditions, will lead to immediate termination (Employer Exhibit 3). The claimant was aware of the employer's rules based on her training and experience with the employer. The claimant acknowledged that if someone purposefully would spit on the production floor, it would lead to them being fired. The employer reported it treated spit as a biohazard such as blood and would bleach an area in the event of a biohazard report.

Due to the nature of the employer business, employees are permitted to use the restroom at designated breaks but then must request permission from management to leave the production line to not halt operations. The claimant had a history of medical issues that increased her need to use the restroom at times. She also had a history of her manager, Mr. Tran, not allowing her to use the restroom upon request, and so she resorted to wearing additional garments to protect herself when she could not use the restroom in time. The claimant did not report her concerns about Mr. Tran to the employer's human resources before she was discharged.

The claimant was discharged after twelve years of employment based upon a single incident which occurred on October 10, 2018 around 1:57 p.m. Leading up to the incident, the claimant had on four occasions asked Mr. Tran to use the restroom saying "I have to pee". He responded each time "so what". After the fourth time, the claimant walked away from the production line towards the basement bathroom.

What occurred next is disputed: the employer received a report from quality control auditor, Juana Zermeno, that the claimant had reportedly spat on the floor after arguing with Mr. Tran. Ms. Zermeno did not approach the parties because they were having an argument and did not personally see the claimant spit. The employer also stated a video surveillance video showed the claimant bowing her head, clasping her hands in a "praying" formation and then spitting at Mr. Tran's feet. The employer elected not to have Mr. Tran participate in the hearing because he was working. The employer also did not produce any video of the claimant's conduct.

In contrast, the claimant stated she has pre-diabetes and became extremely thirsty. After pleading with Mr. Tran, she went to the bathroom for water. When he would not let her, she stuck her tongue out at him to show him she needed water and was dehydrated. The claimant admitted she should not have stuck her tongue out but denied ever spitting at him or at his feet.

The employer reported that spit would be treated as a blood borne pathogen, and therefore bleach would have been the proper protocol to sanitize the floor where the claimant had spat. Ms. Zermeno did not sanitize the floor, and did not observe anyone do so. The claimant did not see the floor bleached after the incident. The employer presented no records or documentation or log showing the floor may have been bleached in response. The individual who reportedly bleached the spot did not attend the hearing either. The employer subsequently discharged the claimant (Employer Exhibit 4).

The claimant established her claim for unemployment insurance benefits in response to her separation from this employer. An initial unemployment insurance decision (Reference 01) resulting in a disqualification of benefits was mailed to the claimant's last known address of record on November 9, 2018. The decision contained a warning that an appeal must be postmarked or received by the Appeals Bureau by November 19, 2018. She received the decision within the appeal period. The appeal was not filed until November 21, 2018, which is after the date noticed on the disqualification decision (Claimant Exhibit A).

The claimant has limited English proficiency and needed help with translating and explaining the initial decision. She went with her son to the Sioux City Iowa Works office on November 19, 2018, the final day to appeal. When she was there, the IWD representative informed them that IWD was very busy trying to fix computers and that personnel was on break. No one assisted her with translating the document or explaining appeal rights. She went back on November 21, 2018 to the same Iowa Works office for help and filed her appeal on the same day (Claimant Exhibit A).

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant's appeal is timely.

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.

The ten calendar days for appeal begins running on the mailing date. The "decision date" found in the upper right-hand portion of the representative's decision, unless otherwise corrected immediately below that entry, is presumptive evidence of the date of mailing. *Gaskins v. Unempl. Comp. Bd. of Rev.*, 429 A.2d 138 (Pa. Comm. 1981); *Johnson v. Board of Adjustment*, 239 N.W.2d 873, 92 A.L.R.3d 304 (Iowa 1976).

The record in this case shows that more than ten calendar days elapsed between the mailing date and the date this appeal was filed. The Iowa Supreme Court has declared that there is a mandatory duty to file appeals from representatives' decisions within the time allotted by statute, and that the administrative law judge has no authority to change the decision of a representative if a timely appeal is not filed. *Franklin v. Iowa Dep't of Job Serv.*, 277 N.W.2d 877, 881 (Iowa

1979). Compliance with appeal notice provisions is jurisdictional unless the facts of a case show that the notice was invalid. *Beardslee v. Iowa Dep't of Job Serv.*, 276 N.W.2d 373, 377 (Iowa 1979); see also *In re Appeal of Elliott*, 319 N.W.2d 244, 247 (Iowa 1982). The question in this case thus becomes whether the appellant was deprived of a reasonable opportunity to assert an appeal in a timely fashion. *Hendren v. Iowa Emp't Sec. Comm'n*, 217 N.W.2d 255 (Iowa 1974); *Smith v. Iowa Emp't Sec. Comm'n*, 212 N.W.2d 471, 472 (Iowa 1973).

The record shows that the appellant attempted to file a timely appeal when she visited the Iowa Works office in Sioux City on November 19, 2018, the final day to appeal. The claimant, who has limited English proficiency, was informed staff was busy and did not help her. She had to come back a second time for assistance. The claimant's good faith effort for assistance was within the prescribed period to help, and logically, if she had received assistance, her appeal would have been timely filed. The claimant's delay in filing her appeal was due to lack of requested assistance by Iowa Workforce Development. She filed her appeal on the same day she visited the Iowa Works office a second time (Claimant Exhibit A). Therefore, the appeal shall be accepted as timely.

The next issue to address is whether the claimant's discharge from employment is disqualifying for unemployment purposes. For the reasons that follow, the administrative law judge concludes the claimant was discharged for reasons other than misconduct, and benefits are allowed, provided she is otherwise eligible.

Iowa law disqualifies individuals who are discharged from employment for misconduct from receiving unemployment insurance benefits. Iowa Code § 96.5(2)a. They remain disqualified until such time as they requalify for benefits by working and earning insured wages ten times their weekly benefit amount. Id.

Iowa Administrative Code rule 871-24.32(1)a provides:

> "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).

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. 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). 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa 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 Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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.

Administrative agencies are not bound by the technical rules of evidence. *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 630 (Iowa 2000). A decision may be based upon evidence that would ordinarily be deemed inadmissible under the rules of evidence, as long as the evidence is not immaterial or irrelevant. *Clark v. Iowa Dep't of Revenue*, 644 N.W.2d 310, 320 (Iowa 2002). Hearsay evidence is admissible at administrative hearings and may constitute substantial evidence. *Gaskey v. Iowa Dep't of Transp.*, 537 N.W.2d 695, 698 (Iowa 1995).

The undisputed evidence is the claimant was discharged for a single incident which occurred on October 10, 2018 and involved her manager, Mr. Tran. The employer discharged the claimant based upon a report that the claimant allegedly spat at Mr. Tran's feet on the production floor. If the claimant did spit, it would require bleaching the area to comply with sanitation practices and because the plant must be in compliance with USDA guidelines.

The employer's witness, Ms. Zermeno, did not approach the claimant and Mr. Tran while they argued, and did not visually inspect saliva afterwards, or clean it up. Mr. Tran did not attend the hearing even though he was at work and no written statement was offered on his behalf. The video footage that was reportedly reviewed by the employer before discharge was not presented. If the claimant had in fact spat on the floor, bleach would have been used to clean it,

and both Ms. Zermeno and the claimant denied seeing the space bleached, nor did the employer present any witness who cleaned it or log/documentation showing it had occurred.

In contrast, the claimant offered detailed, specific testimony about her pleading to Mr. Tran to use the restroom and a pattern of his denials to her requests, causing her to leave her work station after a fourth request on the day in question. The claimant's statement that she showed him her tongue to demonstrate she needed a drink of water may not have been professional but would not be a breach in safety or sanitation protocol.

The employer had evidence available including video footage, a possible witness or record of the spit being bleached, and Mr. Tran, which would have been the best evidence to decipher whether the claimant did in fact spit on the production floor. Ms. Zermeno herself did not see the spitting occur. For unknown reasons, the employer did not submit the evidence for the hearing. When evaluating the claimant's direct testimony versus the employer, which relied upon hearsay and Ms. Zermeno's observations from a distance, the administrative law judge found the claimant's account to be more credible than the employer. The employer has failed to establish by a preponderance of the evidence that the claimant spit on the production floor on October 10, 2018.

The question before the administrative law judge in this case is not whether the employer has the right to discharge this employee, but whether the claimant's discharge is disqualifying under the provisions of the Iowa Employment Security Law. While the decision to terminate the claimant may have been a sound decision from a management viewpoint, for the above stated reasons, the administrative law judge concludes that the employer has not sustained its burden of proof in establishing that the claimant's discharge was due to an act of job related misconduct. Accordingly, benefits are allowed, provided the claimant is otherwise eligible.

The parties are reminded that under Iowa Code § 96.6-4, a finding of fact or law, judgment, conclusion, or final order made in an unemployment insurance proceeding is binding only on the parties in this proceeding and is not binding in any other agency or judicial proceeding. This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

DECISION:

The November 9, 2018, (reference 01) decision is reversed. The appeal is timely. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible. The benefits claimed and withheld shall be paid, provided she is otherwise eligible.

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Jennifer L. Beckman
Administrative Law Judge

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Decision Dated and Mailed

jlb/scn