

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

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TYSON FRESH MEATS INC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12093-SWT  
OC: 09/26/04 R: 01  
Claimant: Respondent (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a - Discharge  
Section 96.3-7 - Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated November 1, 2004, reference 01, that concluded the claimant's discharge was not for work-connected misconduct. A telephone hearing was held on December 6, 2004. The parties were properly notified about the hearing. The claimant provided a telephone number to call for the hearing but was not available at that number at the time of the hearing and failed to participate in the hearing. Jim Petzoldt participated in the hearing on behalf of the employer with a witness, Brad Clark.

FINDINGS OF FACT:

The claimant worked full time for the employer as an hourly worker in the load out department from July 24, 2001 to September 29, 2004. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were

not able to work as scheduled and could be discharged if they received 14 or more attendance points in 12 months. Employees receive attendance points for unscheduled absences and tardiness and receive three points for unreported absences.

As of September 24, 2004, the claimant had received 12 attendance points. He had received a warning for excessive absenteeism on January 21, 2004. He received a second written warning for absenteeism on June 7, 2004, and was informed that he had 10.5 absence points and would be terminated at 14 points. Most of these points were for reporting late for work. The claimant called in sick on July 19 and was late on July 12, July 22, and August 11.

On September 24, 2004, the claimant's supervisor asked the claimant to work replacing another employee on September 25, 2004. The claimant agreed to work. On September 25, the claimant was absent from work without notice to the employer. The claimant was given 3 attendance points, which put him at 15 points. He was discharged on September 29, 2004, for excessive unexcused absenteeism.

The claimant filed for and received a total of \$735.00 in unemployment insurance benefits for the weeks between September 26 and October 16, 2004.

The claimant provided a telephone number to call for the hearing but was not available at that number at the time of the hearing and failed to participate in the hearing. He called on December 8, 2004, and said he missed the hearing because he was working and forgot about the hearing.

#### REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the hearing should be reopened. The unemployment insurance rules provide that a party who fails to participate in a hearing must show good cause before the hearing can be reopened. 871 IAC 24.8(3). The claimant missed the hearing because he forgot about the hearing. Good cause has not been shown.

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

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, (7) provide:

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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant's excessive unexcused absenteeism was a willful and material breach of the duties and obligations to the employer and a substantial disregard of the standards of behavior the employer had the right to expect of the claimant. The final incident involved an absence without proper notice to the employer. Work-connected misconduct as defined by the unemployment insurance law has been established in this case.

As a result of this decision, the claimant is disqualified from receiving unemployment insurance benefits and was overpaid \$735.00 in benefits for the weeks between September 26 and October 16, 2003.

DECISION:

The unemployment insurance decision dated November 1, 2004, reference 01, is reversed. The claimant is disqualified from receiving unemployment insurance benefits until he has been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant was overpaid \$735.00 in unemployment insurance benefits, which must be repaid.

saw/kjf