

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDY L VAZQUEZ
Claimant

APPEAL NO. 07A-UI-11062-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 11/04/07 R: 01
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct
Section 96.5(1)d – Separation Due to Illness/Injury

STATEMENT OF THE CASE:

Wendy Vazquez filed an appeal from a representative's decision dated November 28, 2007, reference 01, which denied benefits based on her separation from Tyson Fresh Meats, Inc. (Tyson). Due notice was issued scheduling a hearing by telephone at 4:00 p.m. on December 17, 2007. Both parties responded to the notice of hearing but neither party was available at the numbers provided at the scheduled time of the hearing. The individual answering the telephone at Ms. Vazquez' number indicated she was at work. Documents submitted by Ms. Vazquez with her appeal were admitted as Exhibit A. A voice mail message was left for the employer's designated witness at 4:02 p.m. but there was no return call. Documents submitted by the employer with its protest to the claim were admitted as Exhibit One.

ISSUE:

At issue in this matter is whether Ms. Vazquez was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Vazquez began working for Tyson on November 3, 2006 and worked full time as a production laborer. She was off work March 21 through 23 and provided the employer with medical documentation of the need to be absent. She also provided documentation of the need to be absent for medical reasons March 27 through April 4. Ms. Vazquez saw Dr. Delany on April 4 and he advised her to remain off work until after she had an MRI on April 9. On April 9, she was advised to remain off work until she underwent an evaluation of her spine.

Ms. Vazquez was seen at the Nebraska Spine Center on April 30. The doctor's statement, a copy of which was faxed to the employer on May 3, indicated that Ms. Vazquez might have surgery on her lower back if she lost weight. The doctor further indicated that she would be evaluated for gastric bypass surgery to help with the weight loss. At that point, Ms. Vazquez

was unable to stand for prolonged periods and could not lift items weighing in excess of 20 pounds. She was restricted from bending, squatting, pushing, and pulling.

On July 19, 2007, the employer was notified by Alegent Health that Ms. Vazquez would have to undergo six months of diet and exercise before her insurance would cover the gastric bypass surgery. It was estimated that the six months of diet and exercise would be completed in September of 2007. Ms. Vazquez's doctor notified the employer on September 19 that Ms. Vazquez was scheduled to have bypass surgery on October 1. The employer received notice from Dr. White on October 11 that the surgery was completed on October 1 and that Ms. Vazquez would be off work for six weeks after the date of surgery.

On or about November 12, Ms. Vazquez was released by her doctor to return to work and provided the employer with a copy of her release. Her job was no longer available to her at that time. The employer's protest to her claim for job insurance benefits indicated that Ms. Vazquez was discharged on June 29, 2007 for failing to report to work or contact the employer.

REASONING AND CONCLUSIONS OF LAW:

The employer protested Ms. Vazquez' claim on the basis that she was discharged from the employment. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer did not participate in the hearing to provide evidence to support its contention that Ms. Vazquez was discharged for misconduct. The assertion that she was absent without notice is not sufficient, in and of itself, to establish misconduct. This is especially true in light of the evidence provided by Ms. Vazquez establishing that the employer was aware of her doctors' visits and recommendations to remain off work. The statements provided by Ms. Vazquez all have a stamp showing they were received in the employer's health services department. For the above reasons, the administrative law judge concludes that the employer failed to establish disqualifying misconduct.

Even if the administrative law judge were to determine that Ms. Vazquez was not discharged, there would still be no basis for disqualification. She was off work beginning in April of 2007 for medical reasons on the recommendation of her doctors. The employer was given notice of the need to be absent. Ms. Vazquez re-offered her services to the employer once she was released in November but no work was made available. Under such circumstances, she would be entitled to job insurance benefits pursuant to Iowa Code section 96.5(1)d.

After considering all of the evidence, the administrative law judge concludes that there is no basis on which to disqualify Ms. Vazquez from receiving benefits. Since she was released to return to work effective November 12, benefits are allowed as of the Sunday of that week, November 11, 2007.

DECISION:

The representative's decision dated November 28, 2007, reference 01, is hereby reversed. Ms. Vazquez was separated from Tyson for no disqualifying reason. Benefits are allowed effective November 11, 2007, provided she satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs