

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GUILLERMO A FRANCO
Claimant

APPEAL NO. 08A-UI-01023-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 12/30/07 R: 01
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's January 16, 2008 decision (reference 01) that concluded Guillermo A. Franco (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last known addresses of record, a telephone hearing was held on February 13, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which he could be reached for the hearing and did not participate in the hearing. Susan Pfeifer appeared on the employer's behalf. During the hearing, Employer's Exhibit One was entered into evidence. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 6, 2001. He worked full time as band saw operator at the employer's Council Bluffs, Iowa, meat packaging facility. His last day of work was December 29, 2007. The employer suspended him on that day and discharged him on January 2, 2008. The stated reason for the discharge was theft of payroll time.

The claimant normally worked 7:00 a.m. until approximately 3:45 p.m., Monday through Friday, plus some overtime. On Saturday, December 15, the claimant clocked in at 6:54 a.m.; however, there was no overtime work for his department that day. He left the facility at 7:25 a.m. but did not clock back out. He returned to the facility at 1:21 p.m., went to his locker, and then left again, but clocked out before leaving with a clock out time of 1:34 p.m. This therefore generated 43 minutes of pay at his regular hourly rate and 5 hours and 47 minutes of overtime pay.

Payroll for the pay period ending December 15 was run on December 18 and paid on December 20. On December 21 the employer's industrial engineer prepared an overtime report indicating overtime incurred by department for the week ending December 15, which was delivered to Ms. Pfeifer, the human resources representative. She was not in the office on December 21, but when she returned on December 24 she saw the report. She was surprised to see the hours listed for the claimant's department, as she had believed no one in that department had worked overtime during the week ending December 15. However, after the Christmas holiday she made inquiry of other department supervisors whose departments had worked on December 15 to see if they had asked the claimant to work in their areas on that day; they responded that they had not. The claimant then pulled the security surveillance to verify the times of the claimant's comings and goings.

When confronted on December 29 the claimant had indicated that he had simply forgotten to punch out when he left after learning he was not needed, that he had returned to his locker to pick up some items, and then left; however, he denied that he had clocked out when he had left the second time. The employer then checked the time clock and found that the 1:34 clock out had in fact been made by a time card swipe, not a managerial manual override, the only other way there could have been a clock out at that time. As a result of the employer's conclusion that the claimant had intentionally left himself clocked in for a length of time that he was not working and then returned and clocked out to make it appear that he had worked the overtime that day, he was discharged.

The claimant established a claim for unemployment insurance benefits effective December 30, 2007. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$982.00.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

Iowa Code § 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

Henry, supra.

The time frame for an act of misconduct to be a "past act" is not defined by statute or rule. In Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988), the court indicated that eleven calendar days was not too long so as to become a "past act" at least where notice was given of the potential of disciplinary action by the fourth day. Here, the incident was one that was not immediately apparent, so that the employer was not in a position where it reasonably could have discovered the conduct until after the payroll was run and the overtime report generated, which were done in a reasonable length of time after the ending of the pay period. Therefore, the employer was not in a position as to where it reasonably could have discovered the conduct until December 21. The suspension of the claimant occurred eight calendar days later, a count which also includes the additional non-work day of December 25. The administrative law judge therefore concludes that the claimant's actions on December 15 were a current act upon the point of his suspension December 29. The claimant's intentional failure to clock out when he was not needed in the morning of December 15 and his intentional return that afternoon so there would be a clock out for the day, thus generating overtime pay,

shows a willful or wanton disregard of the standard of behavior the employer has the right to expect from an employee, as well as an intentional and substantial disregard of the employer's interests and of the employee's duties and obligations to the employer. The employer discharged the claimant for reasons amounting to work-connected misconduct.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's January 16, 2008 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of December 30, 2007. This disqualification continues until the claimant has been paid ten times his weekly benefit amount for insured work, provided he is otherwise eligible. The employer's account will not be charged. The claimant is overpaid benefits in the amount of \$982.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw