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

ALBERTO F QUINTANA
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COLUMBUS JUNCTION IA 52738

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

Appeal Number: 05A-UI-01806-DT
OC: 01/16/05 R: 04
Claimant: Appellant (5)

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 96.5-1 – Voluntary Leaving
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Alberto F. Quintana (claimant) appealed a representative's February 9, 2005 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 8, 2005. The claimant participated in the hearing. Eva Garcia appeared on the employer's behalf. Rosemary Paramo-Ricoy served as interpreter. During the hearing, Claimant's Exhibit A was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 21, 2001. He worked full time as production team member on the third shift of the employer's Louisa County, Iowa pork slaughter and processing facility. His last day of work was December 30, 2004.

On December 31, 2004, as the claimant sought to clock in for work at approximately 9:00 p.m., his supervisor stopped him, as he smelled alcohol on the claimant and believed he saw other signs of intoxication. He directed the claimant to report to the employer's health services office for a breath alcohol test. The claimant reported to health services; however, when he was in the office, the office was unable to get a usable breath test from the claimant, possibly because the claimant was sucking on the testing mouthpiece rather than blowing. Regardless, when the employer was not able to get a usable test after three attempts, the claimant was sent home with instructions to contact the personnel director at 8:00 a.m. on January 3, 2005.

The claimant did not call or report for the meeting on January 3, and did not otherwise contact the employer until approximately January 17, 2005 when he sought to return to work. At that time, the employer informed him that it considered his job ended due to job abandonment. The claimant asserted that he had been ill. He provided some medical documentation that he was to be excused from work on December 31, 2004 and January 7, 2005, and that he had another doctor's appointment scheduled for January 14, 2005, but there was no documentation excusing him from the intervening days; the only doctor's excuse indicated he could return to work on January 8, 2005. He provided no explanation as to why neither he nor someone on his behalf had called in to report his absences were due to illness between January 3 and January 17, 2005, as required by the employer's policies. The claimant had prior absences due to illness which he had properly called in. As a result of his prior absences due to illness, the claimant was at 11 points on the employer's 14-point attendance policy as of December 9, 2004 when he was given a final warning.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant voluntarily quit, and if so, whether it was for good cause attributable to the employer.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Where an individual mistakenly believes that she or he is discharged and discontinues reporting to work, but was never told she or he was discharged, the separation is considered a voluntary quit without good cause attributable to the employer. While it is possible that the claimant could have been discharged on January 3, 2005 due to the incident on December 31, 2004, that was also the claimant's opportunity to provide to the employer any explanation as to what had

happened. Inasmuch as the employer had not told the claimant he was fired and the claimant was a no-call, no-show through January 17, 2005 with out otherwise determining the status of his employment relationship with the employer, he acted in a manner such that the employer would reasonably believe he had abandoned and quit his position. The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify the claimant. Iowa Code section 96.6-2. The claimant has not satisfied that burden. Benefits are denied.

In the alternative, viewed as a discharge, the result is the same. The question would be whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 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.

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).

871 IAC 24.32(7) provides:

> (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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional. Cosper, supra. However, the illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. Therefore, the claimant's final absences were not excused. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct. Benefits are denied.

DECISION:

The representative's February 9, 2005 decision (reference 01) is modified with no effect on the parties. The claimant voluntarily left his employment without good cause attributable to the employer. As of January 3, 2005, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

ld/pjs