

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

MARIO J GALLARDO JR
1616 ROSE LN
STORM LAKE IA 50588

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

Appeal Number: 05A-UI-08537-DWT
OC: 07/03/05 R: 01
Claimant: Respondent (1/R)

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 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's August 10, 2005 decision (reference 06) that concluded Mario J. Gallardo, Jr. (claimant) was qualified to receive unemployment insurance benefits, and the employer's account could be charged for benefits paid to the claimant because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 7, 2005. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Will Sager, the complex human resource manager, appeared on the employer's behalf. 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.

ISSUES:

Did the employer discharge the claimant for work-connected misconduct?

Is the employer's account subject to charge?

FINDINGS OF FACT:

The employer rehired the claimant on March 22, 2005, to work full time in the rendering department. On March 24, 2005, the claimant received training about the employer's safety rules. During the training, the claimant learned any time an employee worked on equipment, the equipment had to be locked and tagged out before an employee could work on the equipment.

Prior to June 15, 2005, the claimant did not have any safety violations. On June 15, the claimant used a pitchfork to remove some lodged product from a machine. The employer discovered the claimant had not locked and tagged out the machine before he used the pitchfork. The claimant was in a hurry to get the product out of the machine and did not think about locking and tagging out the machine.

The employer's disciplinary policy informs employees the first time an employee violates the employer's safety policy results in a three-day suspension. The second violation results in the employee's discharge. Since the claimant was still in his probation, on June 16, 2005, the employer discharged the claimant for failing to complete his probation satisfactorily.

The claimant established a claim for unemployment insurance benefits during the week of July 3, 2005. The claimant previously worked for the employer. Wages the claimant earned from the employer in the second and third quarters of 2004 are included in the claimant's base period.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The employer established compelling business reasons for discharging the claimant. The facts do not establish that the claimant intentionally disregarded the employer's interests on June 15, 2005. Instead, the claimant forgot to lock out a machine before he used a pitchfork to dislodge some product. Even though the claimant did not satisfactorily complete his probation, he did not commit work-connected misconduct. Therefore, as of July 3, 2005, the claimant is qualified to receive unemployment insurance benefits.

An employer's account is not subject to charge when a claimant voluntarily quits employment without good cause attributable to the employer, or an employer discharges him for work-connected misconduct. Iowa Code §96.7-2-a. The record shows the claimant worked two times for the employer, during the second and third quarters of 2004 and March 22, 2005, to June 16, 2005. The wages the claimant earned since March 22, 2005, are not in the claimant's base period. Therefore, the wage credits the claimant earned March 22 through June 16, 2005, are not subject to charge during his current benefit year.

Since the Department has not reviewed the reasons for the claimant's separation during the third quarter of 2004, the issue of whether the employer's account is subject to or exempt from charge for wage credits the claimant earned in the second and third quarter of 2004 from the employer is remanded to the Claims section to investigate and issue a written determination. The parties should note that after the claimant's employment with this employer ended in 2004, the claimant earned wages from other employers that equal or exceed \$2,130.00. Therefore, the claimant's eligibility to receive unemployment insurance benefits is not affected by this Remand.

DECISION:

The representative's August 10, 2005 decision (reference 06) is affirmed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. Therefore as of July 3, 2005, the claimant is qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. The employer's account will not be charged for benefits paid to the claimant during the claimant's current benefit year based on wages the claimant earned March 22 through June 16, 2005. The issue of whether the employer's account will be charged for wages the claimant earned between April 1 and September 30, 2004, is remanded to the Claims Section to investigate and issue a written decision.

dlw/pjs