

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ESTELA M BERMUDEZ
Claimant

APPEAL NO. 07A-UI-10822-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 10/21/07 R: 02
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated November 13, 2007, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice was issued, a telephone conference hearing was scheduled for and held on December 10, 2007. Ms. Bermudez participated personally. The employer participated by Tom Barragan, training coordinator, and Mr. Jamie Frye, superintendent.

ISSUE:

The issues in this matter are whether the claimant was discharged for misconduct in connection with her work and whether the claimant is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from October 26, 1998, until October 5, 2007, when she was discharged for falsification of time records. Ms. Bermudez was employed as a full-time production worker and was paid by the hour.

On or about October 5, 2007, a union steward reported to the claimant's supervisor that Ms. Bermudez was violating time clock procedures. Thirty minutes before the claimant's work shift ended, the plant's production superintendent (Mr. Frye), Mr. Barragan, the training coordinator, and a union steward positioned themselves to watch the company's timecard area. At 2:50 p.m. that day, Ms. Bermudez was personally observed coming to the time clock, punching out a card, and leaving the area. A contemporaneous review of the company's computer system showed that, at the time of the claimant's timecard activity, the claimant's husband was punched in as beginning his work shift, although the claimant's husband was not present. Subsequently, Mr. Frye interviewed the claimant's husband, who was personally known to Mr. Frye. During the interview, Ms. Bermudez' husband admitted that he was not on the premises and admitted a scheme wherein the claimant's husband would punch out the claimant and the claimant would in turn punch in her husband so to make it appear that both individuals were on the clock and working when they were not. Because the claimant had been

given specific training in time clock procedures and had demonstrated the ability to correctly punch in and out for an extended period, a decision was made to terminate Ms. Bermudez based upon what the employer reasonably considered to be an intentional scheme to falsify time records and defraud the company.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence establishes that Ms. Bermudez was discharged for intentional disqualifying misconduct in connection with the work. It does.

The evidence in the record establishes that Ms. Bermudez was personally observed by the plant production superintendent, as well as two other individuals, while she manually punched a timecard at 2:50 p.m. on October 5, 2007. The company's computer system was able to immediately identify that the claimant had, in reality, punched her husband in at that time, although her husband was not on the premises. Subsequently, the claimant's husband was interviewed and admitted involvement in a scheme with his wife to defraud the company by timecard falsification. The evidence in the record establishes that Ms. Bermudez was aware of the correct timecard procedure and had demonstrated the ability to correctly punch in and out for an extended period during her employment with the company.

Based upon the employer's personal observations and the admission of a third party, the employer reasonably concluded that the claimant had engaged in intentional disqualifying misconduct that was contrary to the employer's interests and standards of behavior and the claimant was discharged from employment.

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.

For the reasons stated herein, the administrative law judge concludes that the claimant was discharged for intentional disqualifying misconduct in connection with her work. Unemployment insurance benefits are withheld.

Iowa Code section 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. The claimant is overpaid benefits in the amount of \$2,082.00

DECISION:

The representative's decision dated November 13, 2007, reference 01, is hereby reversed. The claimant was discharged for misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant meets all other eligibility requirements of Iowa law. The claimant is overpaid unemployment insurance benefits in the amount of \$2,082.00.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw