

**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**

**PAMELA S FULTON-MIRANDA
108 COLFAX DR
WATERLOO IA 50707-2654**

**TYSON FRESH MEATS INC
c/o TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 06A-UI-01654-JTT
OC: 01/08/06 R: 01
Claimant: Respondent (1R)**

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 for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absences

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the February 3, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 28, 2006. Claimant Pamela Fulton-Miranda participated. Production Training and Assistant Human Resources Manager Robin Mueller represented the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Pamela Fulton-Miranda was employed by Tyson Fresh Meats as a full-time production worker from March 15, 2005, until December 14, 2005, when Assistant Human Resources Manager Randy Schultz discharged her for excessive absences. On or about November 14,

Ms. Fulton-Miranda returned from what the employer deemed an approved leave of absence. The employer was aware that Ms. Fulton-Miranda had ongoing difficulties with her breathing and had ongoing pain associated with having her teeth extracted. On November 18, 21, and 22, Ms. Fulton-Miranda was absent for illness properly reported to employer. On November 23, Ms. Fulton-Miranda reported to the company nurse with her pain medications. The nurse told Ms. Fulton-Miranda that she would not be allowed to work under the influence of the pain medications and would not be allowed to return to work until she no longer needed the pain medications. Ms. Fulton-Miranda concluded that the employer had placed her back on a leave of absence. Ms. Fulton-Miranda continued to call in her absences on a daily basis, pursuant to the employer's policy, until she learned that Assistant Human Resources Manager Randy Schultz had discharged her on December 14 for excessive absences.

On December 1, 2005, Mr. Schultz had mailed a letter to Ms. Fulton-Miranda, indicating that the employer lacked records justifying Ms. Fulton-Miranda's several absences since November 18, 2005, and directing Ms. Fulton-Miranda to provide medical certification justifying a leave of absence no later than December 9, 2005. The letter indicated that Ms. Fulton-Miranda would be discharged from the employment if she failed to provide the requested documents by the deadline. The employer sent the letter by certified mail and received a return receipt from the United States Postal Service that indicated someone at Ms. Fulton-Miranda's home had signed for the letter. However, Ms. Fulton-Miranda had not seen the letter. The employer did not present the return receipt for the letter at the hearing and employer's witness could not make out the delivery date on the return receipt.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Fulton-Miranda was discharged for misconduct in connection with her employment based on excessive unexcused absences. It does not.

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(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.

The employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board,

616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Fulton-Miranda's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that Ms. Fulton-Miranda's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

Neither party to this matter provided particularly useful or reliable evidence. However, it was the employer who had the burden of proving that Ms. Fulton-Miranda was discharged for a reason that would disqualify her for benefits. The evidence presented by the employer does not sufficiently corroborate the employer's allegation that Ms. Fulton-Miranda's final absence was unexcused or that prior absences were unexcused or excessive. The employer had the ability to present more direct and satisfactory evidence regarding Ms. Fulton-Miranda's contact with the company nurse, Ms. Fulton-Miranda's reporting of the absences, and whether Ms. Fulton-Miranda received the employer's December 1 letter warning of discharge. The employer has failed to meet its burden of proving misconduct that would disqualify Ms. Fulton-Miranda for benefits.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Fulton-Miranda was discharged for no disqualifying reason. Ms. Fulton-Miranda is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fulton-Miranda.

The evidence presented at the hearing raised the issue of whether Ms. Fulton-Miranda has been able and available for work since establishing her claim for benefits. This matter will be remanded for a determination of whether Ms. Fulton-Miranda has in fact been able and available for work since establishing her claim. See Iowa Code section 96.4(3).

DECISION:

The representative's decision dated February 3, 2006, reference 01, is affirmed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements. The employer's account may be charged. The matter is remanded for a determination of whether the claimant has been able and available for work since establishing her claim for benefits.

jt/kjw