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

ANDREW C COLLIER
912 W 1ST
WATERLOO IA 50702

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

Appeal Number: 05A-UI-05083-RT
OC: 04/10/05 R: 03
Claimant: Respondent (1)

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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Tyson Fresh Meats, Inc., filed a timely appeal from an unemployment insurance decision dated May 6, 2005, reference 02, allowing unemployment insurance benefits to the claimant, Andrew C. Collier. After due notice was issued, a telephone hearing was held on June 2, 2005, with the claimant participating. David Duncan, Complex Human Resources Manager, participated in the hearing for the employer. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time hourly production team member from August 24, 2004, until he was discharged on December 22, 2004. The claimant was discharged for falsifying a doctor's excuse. The claimant was absent from work from December 13, 2004 to December 18, 2004. The claimant saw his physician on December 16, 2004. His physician wrote the claimant a doctor's excuse, indicating that the claimant "will be excused from work for approximately five days." The five was written in to complete a blank. This excuse also said that the claimant was to be excused from work from "12-13 to 12-17." The note is silent about the specific day that the claimant is to be released to return to work. The claimant's physician intended to have the claimant off work for a week. When the claimant returned to work on Monday, December 20, 2004, he learned that the employer had had a mandatory work day on Saturday, December 18, 2004. The claimant had never worked a Saturday for the employer before and was not aware, until that Monday, that the employees had worked on Saturday. Since the claimant believed that he was supposed to be off work for an entire week, the claimant changed the number "five" on the doctor's note to "six." The claimant then submitted that doctor's note for an excuse for his absences.

On December 21, 2004, the employer's nurse, Tera Wait, noticed this discrepancy and brought the note in to David Duncan, Complex Human Resources Manager. Mr. Duncan called the physician's clinic, and was told that the doctor's excuse originally said five days. The clinic sent a duplicate copy to Mr. Duncan showing the five days. Mr. Duncan confronted the claimant about this, and the claimant admitted changing the five to a six, but said that he did so because he thought he was making the note correct. The claimant believed that he was to be off work the entire week, which would include Saturday, December 18, 2004. He was trying to make the doctor's note reflect that. The claimant had no satisfactory response as to why he just did not go back and get a new doctor's note. The claimant received no related warnings or disciplines, and this was the only reason for the claimant's discharge. Pursuant to his claim for unemployment insurance benefits filed effective April 10, 2005, the claimant has received unemployment insurance benefits in the amount of $1,246.00 as follows: $178.00 per week for seven weeks from benefit week ending April 16, 2005, to benefit week ending May 28, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is 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(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).

Initially, the parties agreed, and the administrative law judge now concludes, that the claimant was discharged on December 22, 2004. The employer's witness, David Duncan, Complex Human Resources Manager, so testified to this date. The claimant agreed at first, but then later testified he was discharged at some later time, but had no date. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

There is little difference between the testimony of the parties. The claimant was absent from work from December 13, 2004, to December 18, 2004. However, the claimant believed that the employer was only working five days, Monday through Friday, or December 13, 2004, to December 17, 2004. When he returned to work on December 20, 2004, he learned that the employer had also had mandatory work on Saturday, December 18, 2004. The claimant's doctor's excuse for his absences excused the claimant for approximately "five" days, from "12-13 to 12-17." The claimant thought he should be excused for Saturday, December 18, 2004, and therefore changed the number of days to six. The employer discovered the change by calling the medical clinic where the claimant had seen his physician. There appears to be no question that the claimant was ill, at least through December 17, 2004, and that he properly notified the employer about these absences, and that he had a doctor's excuse for those days.

The claimant's absences were not excessive unexcused absenteeism (See 871 IAC 24.32(7)) and he was not discharged for that. The claimant was discharged for altering the doctor's excuse. There is no question that the claimant altered the doctor's excuse.

The real issue is whether the claimant's alteration of the doctor's excuse, under the circumstances and facts here, is disqualifying misconduct. Although it is a close question, the administrative law judge concludes that it is not. The claimant's actions were certainly unwise and inappropriate. However, the claimant credibly testified that his physician had told him that he was to be off work for a week, which would have included Saturday, December 18, 2004. The administrative law judge believes that it was a plausible belief on the part of the physician, and on the claimant, that he would only be working from Monday through Friday, or December 13, 2004, to December17, 2004. The claimant credibly testified that he had never worked a Saturday before, and did not know he was supposed to work that Saturday. The claimant legitimately believed that he was excused from that Saturday, and that the doctor intended that the claimant be excused, so the claimant changed the doctor's note. It is true that the claimant's act in changing the excuse was willful and deliberate, but the administrative law judge concludes that his intention was not to commit a deliberate act constituting a material breach of his duties and obligations arising out of his worker's contract of employment, or that evinced a willful or wanton disregard of the employer's interests. Therefore, the claimant's act is not disqualifying misconduct for those reasons. However, the claimant's act was clearly negligence.

The issue then becomes whether the claimant's act was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that it was not. There were no other reasons for the claimant's discharge, and he had received no related warnings or disciplines. The administrative law judge in no way condones the alteration of doctor's excuses, but believes, in this case, in view of the circumstances and facts presented at the hearing, that the claimant believed that he was justified in altering the doctor's statement to cover the working Saturday, December 18, 2004, which had not been in the contemplation of either the claimant or his physician. There is no evidence that the claimant's physician had released the claimant to work at any particular date, including December 18, or 19, or 20, 2004.

In summary, and for all of the reasons set out above, the administrative law judge concludes that the claimant's act in changing the doctor's excuse was ordinary negligence in an isolated instance, or a good-faith error in judgment or discretion, and is not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

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.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $1246.00 since separating from the employer herein on or about December 22, 2004, and filing for such benefits effective April 10, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of May 6, 2005, reference 02, is affirmed. The claimant, Andrew C. Collier, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out his separation from the employer herein.

kjw/pjs