

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

JOSEPH R FREEBURY  
2360 FRANKLIN AVE  
MT PLEASANT IA 52641-8308

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

Appeal Number: 06A-UI-07809-HT  
OC: 07/31/05 R: 04  
Claimant: Respondent (2)

**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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Tyson, filed an appeal from a decision dated July 24, 2006, reference 03. The decision allowed benefits to the claimant, Joseph Freebury. After due notice was issued a hearing was held by telephone conference call on August 21, 2006. The claimant provided a telephone number of (319) 219-1040. That number was determined to be incorrect by a cross-check with the information on DBRO. The correct number is (319) 217-1040. That number was dialed at 1:04 p.m. and the only response was a voicemail which was clearly identified as belonging to Joseph Freebury. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 1:12 p.m.,

the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer did not provide a telephone number where a representative could be contacted and did not participate.

#### FINDINGS OF FACT:

Having examined all of the evidence in the record, the administrative law judge finds: Joseph Freebury was employed by Tyson from November 8, 2005 until June 29, 2006. He was a full-time shag driver. During the course of his employment the claimant received written disciplinary actions on January 10, February 15 and May 6, 2006. The first one for poor work performance, and the second two for operating the shag negligently and causing damage to a company truck, both of which were stationary at the time. He signed all the warnings and the third one notified him discharge could occur for any further incidents.

On June 29, 2006, the claimant again caused an accident to a stationary vehicle, damaging it. This was the third incident in less than five months. Each of the warnings cautioned him about the proper procedures to be followed in these operations but he failed to abide by the company standards. He was discharged as a result of the final incident.

Joseph Freebury has received unemployment benefits since filing an additional claim with an effective date of July 2, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of his unemployment benefits.

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).

The claimant had been advised his job was in jeopardy as a result of his failure to follow proper safety and driving procedures while operating company property. In spite of the warnings the claimant continued to perform his job in an improper and unsafe manner, resulting in further damage to company property. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's decision of July 24, 2006, reference 03, is reversed. Joseph Freebury is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$1,044.00.

bgh/cs