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

BRANDI D FENN
2541 CHAMBERLIN DR
DENISON IA 51442

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

Appeal Number: 04A-UI-07953-S2T
OC: 06/27/04 R: 01
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

STATEMENT OF THE CASE:

Tyson Fresh Meats (employer) appealed a representative's July 16, 2004 decision (reference 01) that concluded Brandi Fenn (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 16, 2004. The claimant participated personally. The employer participated by Jeff Houston, Human Resources Manager.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on February 9, 1998 as a full-time general labor. She worked from 6:00 a.m. to 2:30 p.m. The claimant received a written warning on August 11, 2003, for being absent due to illness once and tardy five times. On January 15, 2004, the employer issued the claimant a written warning for being absent due to illness once, a family illness once, and twice for personal business. The claimant was also warned about properly reporting her absence, as she was late in reporting her absence once. The employer's answering machine had experienced some problems with recording telephone messages from employees. In the past the claimant has had to provide the employer with a cellular telephone bill to prove she had called the machine and the machine lost the message.

On May 3, 2004, the claimant properly reported she would be absent due to illness. She saw her physician that day. The physician told the claimant that a note would be faxed to the employer indicating the claimant should be excused from work from May 3 through 7, 2004. At about 10:30 p.m. on May 3, 2004, the claimant left a message on the employer's answering machine indicating she would not be at work on May 4, 2004. The employer did not receive the message. At 9:30 a.m. on May 4, 2004, the employer received the excuse from the claimant's physician. Later that same day the claimant provided a copy of the note to the employer. The claimant properly reported her absences on May 5, 6 and 7, 2004.

The claimant returned to work on May 10, 2004. After working for two hours the employer told the claimant she had exceeded her absenteeism points because of her absence on May 4, 2004, without proper notification to the employer. The claimant informed the employer that she left a message on May 3, 2004. The employer told the claimant she could not work until she provided proof that she left the message. The claimant made the telephone call from her boyfriend's residence. The boyfriend and claimant were not on good terms at the time the claimant needed a copy of the telephone record. The boyfriend would not allow the claimant to have a copy of the record. The employer terminated the claimant on June 29, 2004, for failure to properly report her absence on May 4, 2004.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was 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, (8) 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).

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an illness which occurred on May 4, 2004. The claimant's absence does not amount to job misconduct because it was properly reported. The claimant's message was lost by the employer's answering machine, which has lost messages in the past. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's July 16, 2004 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/b