

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

BENJAMIN R MENDEZ Claimant TYSON FRESH MEATS INC Employer	<div>68-0157 (9-06) - 3091078 - EI</div> <div>APPEAL NO. 09A-UI-18108-CT ADMINISTRATIVE LAW JUDGE DECISION</div> <div>OC: 11/01/09 Claimant: Appellant (2)</div>
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Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Benjamin Mendez filed an appeal from a representative's decision dated November 24, 2009, reference 01, which denied benefits based on his separation from Tyson Fresh Meats, Inc. (Tyson). After due notice was issued, a hearing was held by telephone on January 13, 2010. Mr. Mendez participated personally and was represented by Mary Hamilton, Attorney at Law, who offered additional testimony from Claudio Ramirez. The employer participated by Will Sager, Human Resources Manager, and Brett Stevens, Supervisor.

ISSUE:

At issue in this matter is whether Mr. Mendez was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Mendez was employed by Tyson from October 27, 1998 until November 3, 2009. He was last employed full time as a livestock handler. He was discharged as the result of his use of profanity on October 29, 2009.

On October 29, Brett Stevens, a supervisor, went to the pen area to determine why there were holes in the line. While there, he was struck by a hog that was on a rail and being directed back to circulation by Mr. Mendez. He told Mr. Mendez to watch what he was doing. Mr. Mendez told him he had not seen him and that he was to "get the fuck out of the way" because he was in a hurry. As a result of this comment, he was discharged on November 3. He did not have any history of using inappropriate language in the workplace. The supervisor had not had any prior problems with Mr. Mendez. The above matter was the sole reason for the discharge.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321

N.W.2d 6 (Iowa 1982). Mr. Mendez was discharged because he told the supervisor to “get the fuck out of the way.” The profanity was not used in a name-calling context or in the course of disobeying a directive from the supervisor. Nor was it used in the course of an argument with the supervisor. It is unreasonable to expect employees to be docile and well-mannered at all times.

There is no disputing that Mr. Mendez displayed poor judgment in his choice of language on October 29. He worked for Tyson for 11 years and did not have any prior incidents involving inappropriate language. Given this factor and the circumstances under which the language was used on October 29, the administrative law judge concludes that disqualifying misconduct has not been established. An isolated instance of poor judgment is not considered misconduct within the meaning of the law. See 871 IAC 24.32(1). While the employer may have had good cause to discharge, conduct that might warrant a discharge will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated November 24, 2009, reference 01, is hereby reversed. Mr. Mendez was discharged by Tyson but disqualifying misconduct has not been established. Benefits are allowed, provided he is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs