

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

JERAD P EBERT
Claimant

APPEAL NO. 10A-UI-08088-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON RETAIL DELI MEATS INC
Employer

**Original Claim: 05/09/10
Claimant: Appellant (2)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated June 1, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 21, 2010. The claimant participated. The employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Jerad Ebert.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a Tyson plant located in Cherokee, Iowa. The claimant was a maintenance worker. He was initially hired on July 19, 2000. He was terminated on May 6, 2010.

The incident that led to the claimant's termination occurred on May 5, 2010. The claimant had called in sick on May 3, 2010. The employer has a point system for attendance. The claimant was not sick on either May 4, 2010, or May 5, 2010. However, it was his understanding that he could call in sick on May 4, 2010, and May 5, 2010, on the "same point." The claimant decided to take advantage of this provision of the attendance policy and have three days off.

The claimant's mother has a stand at the local farmer's market and the first day of the market was May 5, 2010. The claimant decided to help his mother with her stand. While he was at the farmer's market, he was interviewed by the local television station. His employer saw the news report. The claimant was terminated for what he was told was conduct not in Tyson's best interest.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. A good-faith error in judgment or discretion is not misconduct. The employer has the burden of proof to show misconduct.

There is insufficient evidence in this record to establish misconduct. The employer elected not to participate in the hearing. The claimant was terminated because he called in sick and was then seen on television working at the farmer's market. The claimant thought that he was able to take a sick day, even if he was not sick, and have only one point apply. The administrative law judge has some reservations about that interpretation of the employer's attendance policy. However, no one from the employer participated in the hearing and the claimant's testimony that "everyone" does what he did is un rebutted. Since the employer did not meet its burden of proof to show misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 1, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw