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

Appeal Number: 06A-UI-05125-RT
OC: 04-16-06 R: 01
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, 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.

GERARDO PEREZ
TRAILER #4
106 LEANDER ST
ALTA IA 51002-1014

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

_____
(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 4, 2006, reference 01, allowing unemployment insurance benefits to the claimant, Gerardo Perez. After due notice was issued, a telephone hearing was held on May 31, 2006 with the claimant participating until 3:41 p.m. The claimant was assisted by an interpreter, Ike Rocha. Will Sager, Complex Human Resources Manager for the employer's complex in Storm Lake, Iowa, and Nicole Koeppen, Assistant 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.

The claimant was appropriately participating in the hearing until approximately 3:41 p.m. when the claimant announced that his phone was running out of "juice." The administrative law judge asked if the claimant was using a cell phone and the claimant answered in the negative, no. The claimant said he would go to another phone and the administrative law judge told him to do so quickly. A great deal of static then appeared on the line. The administrative law judge attempted to call the claimant back at 3:41 p.m. and reached a voicemail for the "Perez family." The administrative law judge left a message that he was going to proceed with the hearing and that if the claimant wanted to participate he would need to call before the hearing was over and the record was closed. The administrative law judge explained that it was incumbent upon the claimant to have a telephone that worked properly since it was a telephone hearing. The administrative law judge brought the other parties back and the static was still there so the administrative law judge had the other parties hang up. The administrative law judge then attempted to call the claimant four more times and each time reached the voicemail for the "Perez family." Each time the administrative law judge left a message that he was going to proceed with the hearing except for the last time when the administrative law judge explained to the claimant on the voicemail message that he was going to finish the hearing. When the administrative law judge was unable to reach the claimant after four telephone calls, the administrative law judge continued with the hearing which ended when the record was closed at 3:57 p.m. The claimant never called during that time. It is incumbent upon a party in a telephone hearing to ensure that he or she has a telephone that works properly and that the batteries are charged. Here, the claimant was apparently using a cordless phone but had other phones but the administrative law judge could not reach the claimant at the number the claimant had provided.

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 production worker from June 17, 2003 until he was discharged on April 14, 2006. The claimant was discharged for receiving four written warnings in a 12-month period, which, according to the employer's rules of conduct, requires a discharge. The claimant received a copy of the rules of conduct and the rules of conduct were reviewed with the claimant in Spanish at orientation. The claimant's last written warning occurred on April 12, 2006 when the claimant was caught chewing gum in the production area. The employer's food safety policy, a copy of which the claimant also received and which was reviewed with the claimant in orientation in Spanish, prohibits chewing gum in the production area. After the written warning, the employer spoke to the claimant on April 13, 2006 and asked the claimant if he was chewing gum. The claimant answered in the affirmative yes. The employer then asked the claimant if he knew his job was in jeopardy and the claimant again answered in the affirmative yes. During this interview the claimant was assisted by an interpreter.

On February 22, 2006, the claimant received a written warning again for a production safety sanitation violation for not wearing a beard net properly when having facial hair. The employer's food safety policy requires that those with facial hair wear a beard net and the claimant had facial hair but was not wearing a beard net properly. On November 23, 2005, the claimant received a written warning for another production safety sanitation violation when he was wearing an eyebrow stud in the production area, which is also prohibited by the employer's food safety policies. On August 10, 2005, the claimant received a written warning for leaving the line two minutes early for an unauthorized break which resulted in all the meat that the claimant was handling being thrown off the line some falling on the floor and having to be

discarded. In addition to the written warnings the claimant received three counseling statements as follows: February 13, 2006 for job performance; August 30, 2005 for job performance; and May 20, 2005 for a production safety sanitation violation for wearing an earring which is prohibited by the employer's food safety policy. Pursuant to his claim for unemployment insurance benefits filed effective April 16, 2006, the claimant has received unemployment insurance benefits in the amount of $2,359.00 as follows: $337.00 per week for seven weeks from benefit week ending April 22, 2006 to benefit week ending June 3, 2006.

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.

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

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 employer's witness, Will Sager, Complex Human Resources Manager at the employer's facility in Storm Lake, Iowa, where the claimant was employed, credibly testified, and the administrative law judge concludes, that the claimant was discharged on April 14, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Mr. Sager credibly testified that the claimant was discharged for accumulating four written warnings in a 12-month period. Mr. Sager further credibly testified that the most recent written warning occurred on April 12, 2006 when the claimant was given a written warning for chewing gum in the production area in violation of the employer's food safety policies. The claimant did not testify at the hearing but at fact-finding the claimant conceded that he was chewing gum and was aware that he was not supposed to be chewing gum on the lines. The claimant at fact-finding stated that everyone else was doing it but even assuming that this is true, it is no excuse for the claimant to violate a food safety policy especially when he had additional warnings for such violations as noted below.

The claimant received a written warning on February 22, 2006 for not wearing a beard net properly in the production area, which is required by the employer's food safety policy when an employee has facial hair as did the claimant. On November 23, 2005, the claimant received a written warning for another production safety sanitation violation when he was wearing an eyebrow stud in the production area, which also is prohibited by the employer's food safety policy. The claimant's fourth written warning occurred because the claimant left for a break two minutes early resulting in meat falling off of the line some falling on the floor and being discarded. Further, the claimant had two counseling statements for job performance and a counseling statement on May 20, 2005 for another production safety sanitation violation when the claimant was wearing an earring in the production area, which is prohibited by the employer's food safety policy.

The administrative law judge concludes that in view of all of the claimant's warnings and his consistent and persistent violation of the employer's food safety policies, the administrative law judge is constrained to conclude that the claimant's acts were deliberate acts constituting a material breach of his duties and obligations arising out of his worker's contract of employment and evince a willful or wanton disregard of the employer's interests and, at the very least, are carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Accordingly, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, he requalifies for such benefits.

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 $2,359.00 since separating from the employer herein on or about April 14, 2006 and filing for such benefits effective April 16, 2006. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 4, 2006, reference 01, is reversed. The claimant, Gerardo Perez, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of $2,359.00.

kkf/pjs