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

IRMA J ESTUPINIAN MARTINEZ
2205 EAST FIFTH ST APT 1
STORM LAKE IA 50588

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

Appeal Number: 04O-UI-07590-RT
OC: 04-04-04 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
Section 96.5-1– Voluntary Quitting
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 April 21, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Irma J. Estupinian Martinez. After due notice was issued, a telephone hearing was held on August 10, 2004, with the claimant participating. The claimant was assisted by an interpreter, Susana Jacquez. Jim Petzoldt, Human Resources Manager in the Storm Lake, Iowa, facility, 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.

An initial hearing was held in this matter on May 28, 2004, without the claimant participating. By decision dated May 28, 2004, the administrative law judge who held that hearing entered a decision denying the claimant benefits. The claimant appealed to the Employment Appeal Board. By decision dated July 2, 2004, the Employment Appeal Board remanded this matter for another hearing.

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 hourly production worker on the second shift from March 20, 2003 until she was separated from her employment on April 6, 2004. On April 1, 2004, the claimant came to work and worked two hours. Her tooth hurt and she informed her supervisor, Mr. Hilario. He sent her to the nurse. The nurse returned the claimant to Mr. Hilario, who told the claimant to take medicine. The claimant refused because she had already taken some medicine and did not know what the medicine was that Mr. Hilario wanted her to take. While the claimant was gone, there had been some kind of a problem with a ham where the claimant had been working. Mr. Hilario was upset and told the claimant to go home that she was fired. Because the claimant was not sure that she was fired she returned to work the next day, April 2, 2004 and was told by Mr. Hilario to go home and to come back on April 6, 2004 and meet with human resources and turn in her equipment. The claimant did so and was told at that time that she was fired because of attendance. The claimant turned in her equipment. The claimant did not work on April 2, 2004, after being sent home a second time by Mr. Hilario and was absent on April 5 and 6, 2004. By the time the claimant returned to work on April 6, 2004 to turn in her equipment, she had exceeded the points on the employer's attendance policy. The employer has a policy that provides, among other things, that an employee who is absent for three consecutive days without notifying the employer is considered to have voluntarily quit. The employer treated the claimant as a quit for not being at work on April 2, 5, and 6 2004. The claimant never expressed any concerns to the employer about her working conditions nor did she ever indicate or announce an intention to quit if any of her concerns were not addressed. Frontline supervisors are not supposed to discharge employees, but the employer does have a frontline supervisor by the name of Mr. Hilario.
Pursuant to her claim for unemployment insurance benefits filed effective April 4, 2004, the claimant has received unemployment insurance benefits in the amount of $1,768.00 as follows: $73.00 for benefit week ending April 10, 2004 (earnings $350.00) and $339.00 per week for five weeks from benefit week ending April 17, 2004 to benefit week ending May 15, 2004. This amount is now shown as overpaid.

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 not.

2. Whether claimant is overpaid unemployment insurance benefits. She is not.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

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, (7) provide:

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).

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was absent for three days in a row without notifying the employer. The claimant maintains that she was discharged after being sent home from work on two days and finally turning in her equipment to human resources and being told she was discharged on April 6, 2004. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The claimant credibly testified that on April 1, 2004 she had a sore tooth and went to the nurse. When she refused medicine from her supervisor,

Mr. Hilario, he got upset and also became more upset because of some matter with a ham which was in the claimant's work area but had happened while the claimant was gone to the nurse. Mr. Hilario told the claimant that she was fired and to go home. She did. The claimant returned the next day and was again told by Mr. Hilario to go home and to return to human resources on April 6, 2004 and turn in her equipment. The claimant returned to human resources on April 6, 2004 and was told that she was fired because of her attendance and she turned in her equipment. The testimony of the employer's witness, Jim Petzoldt, Human Resources Manager, is primarily hearsay and does not outweigh that of the claimant and in fact is not in real conflict with the claimant's testimony. Under the evidence here, the administrative law judge is constrained to conclude that the claimant did not voluntarily quit. She was absent for a number of days but this was because she was told to go home by Mr. Hilario and not return to work until April 6, 2004 when she did so. Because of the instructions by her supervisor, Mr. Hilario, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant both demonstrated an intention to terminate the employment relationship and performed an overt act to carry out that intention as required for a voluntary quit by Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). Accordingly, the administrative judge concludes that the claimant did not leave her employment voluntarily but was discharged on April 6, 2004 by human resources. Mr. Petzoldt testified that frontline supervisors do not have the authority to discharge people. It appears here that the claimant was actually discharged by human resources even though she was sent home on two different occasions by her supervisor. There is nothing in the record to indicate that frontline supervisors do not have the authority to send someone home and the claimant would certainly not contest the authority of a frontline supervisor when she was told to go home.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer has failed to provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of her employer's interests and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. There is no such evidence in the record. Leaving work because she was instructed to do so by her supervisor is not disqualifying misconduct. The administrative law judge further concludes that the claimant's leaving work early on April 1, 2004 and although coming to work on April 2, 2004, not working that day, were for reasonable cause because she was sent home by her supervisor, Mr. Hilario. Further, the administrative law judge concludes that the claimant's absences on April 5 and 6, 2004 were also for reasonable cause. The claimant was told not to return to work until April 6, 2004 and to turn in her equipment to human resources. The claimant naturally followed those instructions and returned to work on April 6, 2004 but by that time human resources believed that the claimant had three absences as a no-call/no-show and, therefore, terminated the claimant for attendance. However, the administrative law judge concludes that those absences were for reasonable cause. The administrative law judge also concludes that the claimant had good cause for not reporting those absences since she was instructed on two occasions to go home and on one occasion not to return until April 6, 2004. Therefore, the administrative law judge concludes that the

claimant's absences were not excessive unexcused absenteeism and disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct sufficient to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant a disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided she is otherwise eligible.

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 $1,768.00 since separating from the employer herein on or about April 6, 2004 and filing for such benefits effective April 4, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of April 21, 2004, reference 01, is affirmed. The claimant, Irma J. Estupinian Martinez, is entitled to receive unemployment insurance benefits provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

mb/tjc