

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

LUKE LARSON
188 DIVISION
ALTA IA 51002

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

AMENDED

Appeal Number: 050-UI-05063-BT
OC: 12/19/04 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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.3-7 - Overpayment

STATEMENT OF THE CASE:

Tyson Retail Deli Meats, Inc. (employer) appealed an unemployment insurance decision dated February 24, 2005, reference 02, which held that Luke Larson (claimant) was eligible for unemployment insurance benefits. Administrative Law Judge Brightman conducted an initial hearing in this matter on March 22, 2005 in appeal 05B-UI-02259-BT in which benefits were denied. The claimant failed to participate as he was not available when called for the hearing

and subsequently appealed the decision. The Employment Appeal Board determined there was insufficient evidence to make a decision on the record as it stood. The case was remanded in an order dated May 10, 2005, for the limited purpose of determining what caused the seven-day delay before disciplinary action was taken and what the nature was of the prior absences. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 2, 2005. The claimant participated in the hearing. The employer participated through Matt Chase, Employment 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 employed as a full-time laborer from May 18, 2004 through January 17, 2005. He was discharged from employment due to a final incident of absenteeism that occurred on January 11, 2005. The claimant called in and said he could not get to work that day due to bad weather but the employer did not have any other absences due to weather. The claimant was last warned on November 10, 2004, that he had ten points and would be discharged if he reached 14 points. Prior warnings were issued on October 9 and November 1 2004.

Disciplinary attendance warnings are typically issued for three points but less than six, six points but less than ten, and ten points but less than 14. Employees are discharged once they reach 14 points. The claimant's absences and point allocation are as follows:

November 12, 2004 – no-call/no-show = 3 points for a total of 13
November 10, 2004 – late = 1 point for a total of 10
November 9, 2004 – late = 1 point for a total of 9
November 8, 2004 – late = 1 point for a total of 8
November 4, 2004 – sick = 1 point for a total of 7
November 4, 2004 – sick = 1 point for a total of 6
October 19, 2004 – no-call/no-show = 3 points for a total of 5
October 15, 2004 – sick = 1 point for a total of 2
October 8, 2004 – sick = 1 point for a total of 1

Only four of the claimant's 16 points were due to illness, while the majority of the allocated points were due to unexcused absences.

The claimant's final absence was for the night of January 11, 2005. The human resource office would not become aware of it until the following morning on January 12, 2005. Attendance tracking typically runs one day behind and then the human resources specialist completes the daily absenteeism report, checks the employee's record, initiates the preliminary paperwork and forwards the information to the human resources manager. Then the employer has to contact the claimant and bring him to the office.

The claimant filed a claim for unemployment insurance benefits effective December 19, 2004 and has received benefits after the separation from employment in the amount of \$756.00.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has

discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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 has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on January 17, 2005 for excessive unexcused absenteeism.

871 IAC 24.32(7) provides:

(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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused since it was reportedly due to bad weather and the employer had no other absences due to weather that night. The final absence, in combination with the claimant's history of absenteeism, is considered excessive.

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. 871 IAC 24.32(8). The claimant was discharged six days after his final absence. The employer's attendance policy provides termination will occur at 14 points. The claimant was notified he was at ten points on November 10, 2004 and only two days later he received three additional points for a no-call/no-show. There was no question that if he accumulated one additional point, he would be terminated. Under the circumstances, a discharge six days after the final act does not make it a past act. The Court has held that a lapse of 11 days from final act until discharge when claimant was notified on fourth day that his conduct was grounds for dismissal did not make final act a "past act." Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The unemployment insurance decision dated February 24, 2005, reference 02, is reversed. The claimant is not eligible to receive unemployment insurance benefits because he was discharged from work for misconduct. Benefits are withheld until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant is overpaid benefits in the amount of \$756.00.

sdb/pjs/pjs