

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KIRK A HOWARD
Claimant

APPEAL NO. 08A-UI-01112-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 01/06/08 R: 03
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct
Section 871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

An appeal was filed from a representative's decision dated January 23, 2008, reference 01, which concluded Kirk Howard was discharged for misconduct in connection with his employment with Tyson Fresh Meats, Inc. A telephone hearing was scheduled for February 18, 2008. Neither the claimant, the appellant herein, nor the employer responded to the notice of hearing.

ISSUE:

At issue in this matter is whether the decision previously entered should be affirmed.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The parties failed to provide a telephone number at which they could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

The administrative law judge has conducted a careful review of the administrative file to determine whether the unemployment insurance decision should be affirmed.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

Withdrawals and postponements.

(3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within

15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.

(4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.

(5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

The administrative law judge has carefully reviewed the evidence in the record and concludes that the unemployment insurance decision previously entered in this case should be reversed. The claimant herein was discharged due to his attendance. The employer had the burden of proving disqualifying misconduct. The employer did not participate in the hearing to establish that the discharge in this case was based on a current act of misconduct. The claimant indicated in his fact-finding statement that his last absence was approximately one week before his separation. The employer failed to present evidence of excessive unexcused absenteeism. As such, the employer did not sustain its burden of proof in this matter. Accordingly, it is concluded that misconduct has not been established and benefits are allowed.

Pursuant to the rule, the appellant must make a written request to the administrative law judge within 15 days after the mailing date of this decision asking that the hearing be reopened. The written request should be mailed to the administrative law judge at the address listed at the beginning of this decision and must explain the emergency or other good cause that prevented the appellant from participating in the hearing at its scheduled time.

DECISION:

The unemployment insurance decision dated January 23, 2008, reference 01, is reversed. The decision disqualifying the claimant from receiving benefits is reversed as disqualifying misconduct has not been established. This decision will become final unless a written request establishing good cause to reopen the record is made to the administrative law judge or an appeal is filed with the Employment Appeal Board within 15 days of the date of this decision.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/pjs