

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUAN J ARIAS
Claimant

APPEAL NO. 07A-UI-10823-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

**OC: 10/21/07 R: 02
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's November 13, 2007 decision (reference 01) that concluded Juan J. Arias (claimant) was qualified to receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 10, 2007. The claimant failed to respond to the hearing notice by contacting the Appeals Section prior to the hearing and providing the phone number at which he could be contacted to participate in the hearing. As a result, no one represented the claimant. Jamie Frye, the plant production superintendent, and Tom Barragen, the training coordinator, appeared on the employer's behalf.

After the hearing had been closed and the employer had been excused from the hearing, the claimant contacted the Appeals Section. The claimant requested that the hearing be reopened. Based on the claimant's request to reopen the hearing, the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Is there good cause to reopen the hearing?

Did the employer discharge the claimant for work-connected misconduct?

Has the claimant been overpaid any unemployment insurance benefits?

FINDINGS OF FACT:

The claimant started working for the employer on May 10, 1994. The claimant worked as a full-time employee. Prior to October 3, 2007, the claimant's job was not in jeopardy.

The employer investigated the claimant's wife after she regularly asked a union representative if she could use the restroom around 2:50 p.m.. The employer noticed that instead of using the

restroom, the claimant's wife punched out and went home. The claimant's wife worked first shift. When the employer reviewed her timecard, there was no indication she had punched out at 2:50 p.m. Instead, her timecard showed she punched out at 3:30 p.m. Upon further investigation, the employer discovered the claimant's wife, punched the claimant's timecard at 2:50 p.m. to indicate he had reported to work at that time. The claimant worked second shift. The employer concluded that the claimant and his wife punched each other's cards so it appeared the claimant came to work at 2:50 p.m. and his wife left work at 3:30 p.m. In reality, the claimant's wife left work at 2:50 p.m. and it is not known when the claimant actually reported to work.

The employer talked to the claimant and he admitted his wife punched him in at 2:50 p.m. and he punched her out at 3:30 p.m. The claimant's wife denied any knowledge about any of this. Even though the claimant had been working since 1994, the employer discharged him on October 5 for violating the code of conduct or for falsifying his timecard.

The claimant established a claim for unemployment insurance benefits during the week of October 21, 2007. He filed claims for the weeks ending October 27 through December 8, 2007. He received his maximum weekly benefits amount of \$347.00 for each of these weeks.

A hearing was scheduled for the claimant at noon on December 10. A hearing for his wife was held before another administrative law judge at 11:00 a.m. The claimant's wife participated in her hearing because she had called in for the hearing. There was no indication the claimant or anyone on his behalf called in prior to his scheduled noon hearing. As a result, the claimant was not called.

The claimant did not contact the Appeals section until 1:00 p.m. for the scheduled noon hearing. The claimant asserted he had called in or someone on his behalf had properly responded to the hearing by calling in the claimant's phone number prior to the hearing. The claimant did not have a control number that is given to parties when they follow the hearing instructions. After checking with the Appeals Section clerical staff, there was a record of the claimant's wife calling in for her hearing. There is no record that the claimant or anyone on his behalf called in for his hearing. (The claimant's last name and his wife's last name are different so a person would not know they were married or related.)

The claimant asserted he did not call the Appeals Section until 1:00 p.m. or an hour after the hearing had been scheduled because he assumed an administrative law judge was busy with another case. The claimant requested that the hearing be reopened.

The administrative law judge notes that on November 7, the claimant was determined ineligible to receive benefits because he did not have proof that he was legal resident or citizen. On December 11, another decision was issued now holding him eligible to receive benefits because the he had provided proof he was a legal resident or citizen.

REASONING AND CONCLUSIONS OF LAW:

If a party responds to a hearing notice after the record has been closed and the party who participated at the hearing is no longer on the line, the administrative law judge can only ask why the party responded late to the hearing notice. If the party establishes good cause for responding late, the hearing shall be reopened. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. 871 IAC 26.14(7)(b) and (c).

The administrative law judge does not find the claimant's explanation credible. If the claimant had followed the hearing instructions, he would have received a control number and arrangements for an interpreter to participate in the hearing would have been made. The claimant did not participate in his wife's hearing. While the administrative law judge understands the claimant needs an interpreter, the fact his wife called in for her hearing prior to the scheduled hearing is evidence that the family knew and understood the importance of providing a phone number prior to the hearing if a party intended to or wanted to participate in the hearing. Based on the circumstances in this case, the claimant did not initially intend to participate in the hearing. Changes in his eligibility status may have changed the claimant's mind, but his failure to follow the hearing instructions does not establish good cause to reopen the hearing. Therefore, the claimant's request to reopen the hearing is denied.

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges him for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The claimant intentionally falsified his wife's timecard and permitted her to falsify his timecard. The claimant committed work-connected misconduct. As of October 21, 2007, the claimant is not qualified to receive unemployment insurance benefits.

If an individual receives benefits he is not legally entitled to receive, the Department shall recover the benefits even if the individual acted in good faith and is not at fault in receiving the overpayment. Iowa Code § 96.3-7. The claimant is not legally entitled to receive benefits for the weeks ending October 27 through December 8, 2007. The claimant has been overpaid \$2,429.00 in benefits he received for these weeks.

DECISION:

The claimant's request to reopen the hearing is denied. The representative's November 13, 2007 decision (reference 01) is reversed. The employer discharged the claimant for reasons that constitute work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of October 21, 2007. This disqualification continues until he has been paid ten times his weekly benefit amount for insured work, provided he is otherwise

eligible. The employer's account will not be charged. The claimant has been overpaid and must repay a total of \$2,429.00 in benefits he received for the weeks ending October 28 through December 8, 2007.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css