

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

ABRAHAM COLON
725 WILLIS AVE
PERRY IA 50220

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

Appeal Number: 04A-UI-00931-DWT
OC 12/21/03 R 02
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 are 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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's January 20, 2004 decision (reference 01) that concluded Abraham Colon (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 February 17, 2004. 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. Tom Barrigan, the employment manager, and Mike Cleaver, the training coordinator, appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

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 April 9, 2001. The claimant worked as a full-time production worker. The claimant knew about the employer's written drug policy. The policy informed employees the employer could ask an employee to submit to a drug test if the employer had reasonable suspicion the employee was under the influence of a drug. The first time an employee tests positive, the employer offers the employee an opportunity for rehabilitation and continued employment. If an employee tests positive a second time, the employer discharges the employee.

As the result of a September 29, 2003 test, the claimant entered self-rehabilitation and was suspended just one day. The claimant's September 29 test and confirmatory tests were both positive. The employer's policy indicates a reading over 0.04 is unacceptable or positive. The claimant had been drinking at a party the night before this test and did not believe he had a problem. As a result of the positive test, the claimant understood that within the next eight weeks the employer would ask the claimant to take a second, unannounced test to make sure there were not any more positive results.

On December 4, 2003, the employer asked the claimant to take a Breathalyzer test. The portable Breathalyzer was calibrated and obtained a reading of 0.067. After 15 minutes, the employer took a confirmatory test and obtained a reading of 0.052. Both tests were positive. Although the claimant told the employer he had taken Nyquil for colds before he came to work and that afternoon, the employer understood this over-the-counter cold medicine would not result in the readings the employer obtained. The employer discharged the claimant on December 5 for violating the employer's drug and alcohol policy.

The claimant established a claim for unemployment insurance benefits during the week of December 21, 2003. He filed claims for the weeks ending December 27, 2003 through February 7, 2004. He received his maximum weekly benefit amount of \$243.00 during each of these weeks.

REASONING AND CONCLUSIONS OF LAW:

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).

A preponderance of the evidence indicates the claimant understood the employer's drug and alcohol policy. The facts establish the employer complied with its drug policy and Iowa Code §730.5. The employer established the claimant committed work-connected misconduct by violating the employer's drug and alcohol policy. As of December 21, 2003, 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 unemployment insurance benefits during the weeks ending December 27, 2003 through February 7, 2004. He has been overpaid a total of \$1,701.00 in benefits he received for these weeks.

DECISION:

The representative's January 20, 2004 decision (reference 01) is reversed. The employer discharged the claimant for reasons constituting work-connected misconduct. The claimant is disqualified from receiving unemployment insurance benefits as of December 21, 2003. 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 is not legally entitled to receive unemployment insurance benefits during the weeks ending December 27, 2003 through February 7, 2004. He has been overpaid a total of \$1,701.00 in benefits

dlw/b