

**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**

**MARICELA B RUVALCABA  
1317 BOHNER HILL RD  
DENISON IA 51442**

**TYSON FRESH MEATS INC  
c/o TALX UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-03300-RT  
OC: 02/22/04 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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct  
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 March 16, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Maricela B. Ruvalcaba. After due notice was issued, a telephone hearing was held on April 16, 2004, with the claimant participating. Jeff Houston, Human Resources Manager, and Ramon Arambula, Employment Manager, 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.

#### 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 general laborer from January 23, 2003 until she separated from her employment on or about February 5, 2004. The claimant requested and was granted a leave of absence from January 12, 2004 to January 19, 2004 to visit her ill father in California. The leave of absence was extended to January 26, 2004. The employer approved this leave of absence. The claimant returned to the employer and worked on January 26, 27, 28, 2004. Thereafter, the claimant was absent on January 29 and 30, 2004 and February 2, 3, and 4, 2004 without notifying the employer. The claimant's father had taken a turn for the worse and was expected to die and she went to California to be with him. However, during that time, the claimant never called or notified the employer of her absences. On February 5, 2004, the claimant called and spoke to Ramon Arambula, Employment Manager and one of the employer's witnesses. She informed him that her father had died and she was absent because of this. She also told him that she was going to run her father's business in California. Mr. Arambula informed the claimant that she should call Jeff Houston, Human Resources Manager and one of the employer's witnesses. The claimant did not call Mr. Houston until February 16, 2004 after she had returned to Iowa. At that time, she was told that she was separated. Between February 5, 2004 and February 16, 2004, the claimant did not report to work nor did she contact anyone at the employer. Prior to January 12, 2004, the claimant had no real attendance problem, but did get a written warning for attendance on May 3, 2003. The employer has a policy that an employee must call or notify the employer of an absence 30 minutes prior to the start of the employee's shift.

Pursuant to her claim for unemployment insurance benefits filed effective February 22, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,037.00 as follows: \$291.00 per week for seven weeks from benefit week ending February 28, 2004 to benefit week ending April 10, 2004.

#### 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.
2. Whether the claimant is overpaid unemployment insurance benefits. She is.

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.

871 IAC 24.25 provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa

Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer.

871 IAC 24.25(23) provides:

(23) The claimant left voluntarily due to family responsibilities or serious family needs.

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) 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).

(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 claimant voluntarily quit when she stopped coming to work beginning January 29, 2004 and not informing the employer until February 5, 2004. The claimant maintains that she was discharged. The claimant first said that she was discharged when she spoke to Ramon Arambula, Employment Manager, and one of the employer's witnesses, on February 5, 2004. Later, the claimant seemed to recant this and said she did not remember but that she was discharged on February 16, 2004 when she called Jeff Houston, Human Resources Manager, and one of the employer's witness, and told him that she was ready to return to work. The administrative law judge is constrained to conclude that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. Much of the testimony of the witnesses is not in dispute. The claimant was absent for five working days, January 29 and 30, 2004 and February 2, 3, 4, 2004 without notifying the employer. When the claimant called the employer on February 5, 2004 and spoke to Mr. Arambula, she informed him that she was going to run her father's business. He told the claimant that she needed to call Mr. Houston. The claimant agrees that she called Mr. Arambula on February 5, 2004 and finally conceded that she told him that maybe she would be quitting. The claimant also conceded that she was told to call Mr. Houston. However, the claimant did not call Mr. Houston until 11 days later when she returned to Iowa. Under the circumstances here, the administrative law judge believes that the claimant voluntarily quit when she was absent for five days without notifying the employer. When she notified the employer, she informed the employer that she was going to quit and then, even after being told to call Mr. Houston, she did not do so for 11 more days. The administrative law judge believes that the employer was justified in believing on February 5, 2004 that the claimant quit and was certainly justified in believing that when the employer did not hear from the claimant for another ten days. The claimant testified that on one of the days that she worked, January 26, 27, 28, 2004 she informed someone at the employer that she might have to be leaving. This is not particularly credible because the claimant had previously requested a leave of absence appropriately and it had been granted so she was aware of the process and the need to inform the employer. Further, the claimant testified that she did not have any time to call the employer during the first five working days while she was in California but this is not credible. The administrative law judge understands the emotional difficulties on the claimant, but believes that she could have found a spare two to three minutes to call the employer. The claimant testified that the employer was closed on February 2, 3, 2004 but the employer denied this. Even if the employer had been closed, the telephone number that employees use to notify the employer of absences was still operating and Mr. Houston was there throughout that time. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. It appears to the administrative law judge that the claimant actually quit due to family responsibilities and this is not good cause attributable to the employer. There is also evidence that the claimant quit to relocate to California to run her father's business and this is not good cause attributable to the employer. See 871 IAC 24.25(2). It may be that the claimant changed her mind about the quit, on or about February 16, 2004, but at that time, it was too late.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism. The evidence is clear that the claimant was absent for five days without notifying the employer. Although the claimant may have had good cause for these absences she did not properly notify the employer and these absences were therefore excessive unexcused absenteeism. The claimant testified that she didn't notify the employer because she was busy and she was dealing with the death of her father. The administrative law judge understands the claimant's emotional difficulties, but believes that she could have found a couple of minutes to call the employer and notify the employer and she chose not to do so. The claimant must have known that she should call the employer because she had appropriately requested a leave of absence, which had been extended earlier. The employer also has a policy that requires that employees call in 30 minutes prior to their shift. The claimant did not notify the employer for five days, leaving the employer wondering where the claimant was. Accordingly, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant's absences were not properly reported and were excessive unexcused absenteeism and disqualifying misconduct and the claimant would still be disqualified to receive unemployment insurance benefits. In fact, the claimant never returned to work until February 16, 2004 missing an additional number of days without notifying the employer again after being told to call Mr. Houston and not doing so for 11 days.

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 \$2,037.00 since filing for such benefits effective February 22, 2004, to which she is not entitled and for which she is overpaid. The administrative law judge further concludes that these benefits must be recovered in accordance with the provisions of Iowa Law.

DECISION:

The representative's decision dated March 16, 2004, reference 01, is reversed. The claimant, Maricela B. Ruvalcaba, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits. She has been overpaid unemployment insurance benefits in the amount of \$2,037.00.

kjf/b