

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

RODRIGO ALVARADO-GARCIA
19 N 9TH ST DOWN
DENISON IA 51442

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

AMENDED
Appeal Number: 05A-UI-06339-DT
OC: 01/09/05 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
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Tyson Fresh Meats, Inc. (employer) appealed a representative's June 6, 2005 decision (reference 03) that concluded Rodrigo Alvarado-Garcia (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on July 8, 2005. The claimant participated in the hearing. Martha Miguel appeared on the employer's behalf and presented testimony from one other witness, Darrell Pepper. Guadalupe McCarney served as interpreter. Based on 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 16, 2004. He worked full time as a cattle sorter at the employer's Denison, Iowa beef slaughter and processing plant on a 5:30 a.m. to 2:30 p.m. Monday through Friday schedule. His last day of work was April 29, 2005. The employer discharged him on May 18, 2005. The reason asserted for the discharge was excessive absenteeism.

The employer has a 14-point absenteeism policy under which an employee is given a notice after three points, a letter after six points, another letter after ten points, and is discharged at 14 points in a running year. The claimant had received his ten-point warning on April 4, 2005. On April 25, 2005, he had been a no-call/no-show, incurring three points and bringing him to 13 points. On April 29, 2005, the claimant requested a leave of absence from the employer in order to go to Mexico to attend to his sick mother. The employer granted a two-week leave of absence, and informed the claimant that he was expected to be back for work on May 16, 2005.

The claimant left Mexico on Saturday, May 14, 2005. He had been briefly detained at the border, but had arrived back in Denison by approximately 8:00 p.m. Sunday, May 15, 2005. Upon his arrival into town, the claimant was stopped by a police officer and questioned regarding an allegation of theft that had been made at least against the claimant's wife. During the stop, the officer observed beer cans in the claimant's truck, and concluded that the claimant was intoxicated. The claimant denied that he was intoxicated, but declined to take the field sobriety tests. He was therefore arrested, booked into the jail, and charged with operating a motor vehicle while intoxicated (OWI). The criminal charge had yet to be resolved as of the date of the hearing in this case.

The claimant was released from custody at approximately 6:00 p.m. on Monday, May 16, 2005. He had been a no-call/no-show for work as the jail had not allowed the claimant to make a call to the employer. He was a no-call/no-show for work the morning of Tuesday, May 17, 2005; the claimant's wife called the employer at approximately 12:00 p.m. and reported that the claimant had been detained in Texas but that he would be back at approximately 12:30 p.m. The claimant and his wife did come to the employer's personnel office at approximately 12:30 p.m. on Tuesday, May 17, 2005. The claimant led the personnel director to believe that the reason he had just then come in to work was that he had just returned from Texas and Mexico, and that the delay had been due to being unjustly detained at the border. The employer demanded that the claimant provide proof of his being in Texas and Mexico in order to consider excusing the claimant's absence.

On May 18, 2005, the claimant returned to the employer's personnel office and did have some receipts indicating that he had been in Texas and Mexico. However, by this time the personnel director had learned of the report of the claimant's arrest in Denison on Sunday evening. He informed the claimant that it did not matter what documentation the claimant had regarding when he had been in Texas and Mexico, because his missed work since returning to Denison was not excused. The claimant indicated that he had been in Denison since Sunday night and that his absence until Tuesday at 12:30 p.m. was due to "personal reasons." The employer maintained that the claimant's employment was terminated.

The claimant established a claim for unemployment insurance benefits effective January 19, 2005. He filed an additional claim effective May 15, 2005. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,680.00.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

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 claimant's final absence was not excused and was not due to illness or other reasonable grounds. Even if the claimant's absence on Monday, May 16, 2005 might be found excused if the criminal charge against him should be dismissed, there is no excuse for the claimant's absence the morning of Tuesday, May 17, 2005, since he was released from jail the night before. The claimant had previously been warned that future absences could result in termination. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

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 representative's June 6, 2005 decision (reference 03) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 15, 2005. 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 overpaid benefits in the amount of \$1,680.00.

ld/sc