

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ENRIQUE TAMAYO-MARQUEZ
Claimant

APPEAL NO. 13A-UI-03186-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 02/17/13
Claimant: Appellant (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Enrique Tamayo-Marquez, filed an appeal from a decision dated March 14, 2013, reference 01. The decision disqualified him from receiving unemployment benefits. After due notice was issued a hearing was held by telephone conference call on April 15, 2013. The claimant participated on his own behalf and Ike Rocha acted as interpreter. The employer, Tyson, participated by Human Resources Manager Will Sager.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Enrique Tamayo-Marquez was employed by Tyson from August 31, 1999 until February 15, 2013 as a full-time production worker. He had received orientation and the attendance policy at the time of hire, given in Spanish. The attendance policy is also posted on bulletin boards outside the locker room in Spanish.

The claimant received a written warning on June 12, 2012, when he had accumulated seven points. Discharge may occur at 14 points and the attendance policy was reviewed with him at that time. A second warning and refresher on the attendance policy was given on October 13, 2012, when Mr. Tamayo-Marquez had reached 13 points. Discharge will occur at 14 points.

Sometime in January 2013 the claimant sustained a non-work-related head injury. He continued to work afterward and saw the company nurses on January 25 and 28, 2013, complaining of headache and was sent home.

He was absent from work on January 29, 30, and 31, February 1 and 2, 2013. He did not call in any of those days and accumulated excessive points. He had reached a total of 22.5 points and was discharged when he returned to work on February 15, 2013. He stated he did not call in because he did not have a working phone.

REASONING AND CONCLUSIONS OF LAW:

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.

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 had been advised his job was in jeopardy as a result of his absenteeism. His absences were due to injury but he did not properly report them even though he knew it was his responsibility to do so. Because the absences were not properly reported they are considered unexcused. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). Mr. Tamayo-Marquez was discharged for excessive, unexcused absences. Under the provisions of the above Administrative Code section, this is misconduct and the claimant is disqualified.

DECISION:

The representative's decision of March 14, 2013, reference 01, is affirmed. Enrique Tamayo-Marquez is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount in insured work, provided he is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs