

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

ANGEL D RODRIGUEZ
1013 MICHIGAN ST
STORM LAKE IA 50588

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

Appeal Number: 05A-UI-05940-RT
OC: 05-08-05 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 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 May 26, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Angel D. Rodriguez. After due notice was issued, a telephone hearing was held on June 20, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where he or any of his witnesses could be reached for the hearing, as instructed in the notice of appeal. Sarah Mendoza, Human Resources 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 witness 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 production worker from March 23, 2004 until he was discharged on April 4, 2005 for poor attendance. On April 29, 2005, the claimant was absent from work for a non work-related illness. However, the claimant did not notify the employer until less than ten minutes before the start of the claimant's shift. The employer has a rule that requires that employees notify the employer no later than 30 minutes before the start of that employee's shift. The claimant was informed of this rule in Spanish when he was hired. On March 28, 2005, the claimant was absent for personal business. On that occasion he notified the employer that he was going to be tardy but then never returned to work and did not inform the employer that he would not be back at work. The claimant was absent on February 28, 2005 for personal illness and he timely reported this absence. The claimant was tardy on February 7, 2005 for personal business when he missed a required safety meeting. He did not notify the employer of this tardy. The claimant was absent on February 1, 2005 and the employer did not know why and the claimant did not call in at all and notify the employer. On January 22, 2005, the claimant was tardy because of a power outage but this was excused by the employer. The claimant received several warnings. The claimant received a written letter of warning and an oral counseling on February 28, 2005. On February 1, 2005, the claimant received a written letter of warning. On December 4, 2004, the claimant received an absentee notice in writing. Pursuant to his claim for unemployment insurance benefits filed effective May 8, 2005, the claimant has received no unemployment insurance benefits; Iowa Workforce Development records show no weekly claims or any payment records.

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. He is not because he has received no benefits.

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 employer's witness, Sarah Mendoza, Human Resources Manager, credibly testified, and the administrative law judge concludes, that the claimant was discharged on May 4, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Ms. Mendoza credibly testified that the claimant had an absence on April 29, 2005 that may have been for personal illness but it was not properly reported. Ms. Mendoza further testified credibly that the claimant had an absence on March 28, 2005 for personal business. He called this in as a tardy but never showed up for work and did not notify the employer. On February 7, 2005, the claimant was tardy and missed a safety meeting and he did not notify the employer of this tardy. On February 1, 2005, the claimant was absent and gave no reason and did not notify the employer. The administrative law judge concludes that all of the absences and tardies mentioned above were not properly reported and three of them were not for reasonable cause or personal illness. The claimant received three written warnings in the last five months of his employment. Accordingly, the administrative law judge concludes that the claimant's absences and tardies were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes

that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

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 no unemployment insurance benefits since separating from the employer herein on or about May 4, 2005 and filing for such benefits effective May 8, 2005. Since the claimant has not received any unemployment insurance benefits, he has not been overpaid any such benefits.

DECISION:

The representative's decision of May 26, 2005, reference 01, is reversed. The claimant, Angel D. Rodriguez, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. Since the claimant has received no unemployment insurance benefits, he is not overpaid any such benefits.

pjs/pjs