

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADRIANO A MARQUEZ
Claimant

APPEAL NO: 12A-UI-05060-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TYSON FRESH MEATS INC
Employer

OC: 04/01/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Adriano A. Marquez (claimant) appealed a representative's April 24, 2012 decision (reference 01) that concluded he was not qualified to receive unemployment insurance benefits after a separation from employment from Tyson Fresh Meats, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 21, 2012. The claimant participated in the hearing. Will Sager appeared on the employer's behalf. Howard Abraham 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 August 1, 2011. He worked full time on the second shift as a production worker at the employer's Storm Lake, Iowa pork processing facility. His last day of work was March 12, 2012. The employer suspended him that day and discharged him on March 14. The reason asserted for the discharge was excessive absenteeism.

The employer has a 14-point attendance policy of which the claimant was on notice. He had been given prior warnings on December 22 and December 29, 2011. By March 4 he had 12.5 points, of which 5.5 were for illness, and the remainder were for personal business, lack of a babysitter, and transportation. The claimant's final absence occurred on March 5, 2012. He called in to report he would be absent at 2:23 p.m.; his start time was set at 2:45 p.m., so to meet the employer's requirement to call in within 30 minutes, he should have called by 2:15 p.m. Because the call was late, he was assessed three points for the absence, bringing him to 15.5 points, beyond the 14.0 discharge level. The reason for the final absence was a lack of a babysitter for his children. He had usually been dependent upon family members for childcare, but since his family members had left the area, he had not found a suitable replacement arrangement.

REASONING AND CONCLUSIONS OF LAW:

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 § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). Absences due to issues that are of purely personal responsibility, specifically including childcare issues, are not excusable. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984); *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). The claimant's final absence was not excused and was not due to personal illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. *Higgins*, supra. Further, the employer has established that the claimant's overall absenteeism was primarily due to unexcused reasons. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's April 24, 2012 decision (reference 01) is affirmed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of March 14, 2012. 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs