

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

LONTAY S RILEY
1123 ACKERMANT
WATERLOO IA 50703

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

Appeal Number: 05A-UI-06337-RT
OC: 05/08/05 R: 03
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 96.5-1 – 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 June 6, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Lontay S. Riley. After due notice was issued, a telephone hearing was held on July 5, 2005, with the claimant not participating. The claimant did not call in a telephone number, either before the hearing or during the hearing, where she, or any of her witnesses, could be reached for the hearing, as instructed in the notice of appeal. David Duncan, Complex 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 hourly production team member from October 19, 2004, until she voluntarily quit on April 29, 2005. On April 27, 2005, the claimant was brought into the human resources office to discuss her attendance. At that time, the claimant was not told that she was fired or discharged. Rather, the claimant was informed that she was on an indefinite suspension and that she was to return the next day, April 28, 2005, at 9:00 a.m. to meet with human resources to learn what decisions human resources had reached concerning the claimant's continued employment. The claimant did not appear on April 28, 2005, nor did she notify the employer why. The claimant also did not appear at that time on April 29, 2005, nor did she notify the employer why. Later on April 29, 2005, the claimant came in and completed an exit interview, but indicated on the exit interview that she was discharged. However, no one had ever told the claimant that she was discharged, and the employer treated the claimant as a voluntary quit.

The claimant had numerous absences and tardies in 2005. On April 28 and 29, 2005, the claimant was absent as a no-call/no-show, as noted above. On April 25, 2005, the claimant was absent for illness, but this was properly reported to the employer. On April 21, 2005, the claimant was tardy ten minutes for personal business. There is no evidence that the claimant properly reported this tardy. On April 13, 2005, the claimant was tardy one hour for an appointment. There is no evidence that the claimant notified the employer of that tardy. Later that day the claimant was excused from work for a medical appointment. On April 11, 2005, the claimant was absent for illness, but she did not timely report this absence. On April 8, 2005, the claimant was tardy five hours for personal illness, and she properly reported this tardy. On March 29, 2005, the claimant was tardy two hours and six minutes because she took her mother to the bus station. There is no evidence that the claimant properly reported this tardy. On March 28, 2005, the claimant was absent for personal illness, and this was timely reported to the employer. On March 17, 2005, the claimant was absent for illness, and this was timely reported. On February 14, 2005, the claimant was absent for a non-work injury, and this was timely reported to the employer. On January 7, 2005, the claimant was tardy two hours because of transportation when her car got stuck. There is no evidence that the claimant properly reported this tardy. The claimant received a written letter and counseling for her attendance on April 11, 2005, and a written letter on March 28, 2005.

Pursuant to her claim for unemployment insurance benefits filed effective May 8, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,223.00 as follows: \$247.00 per week for nine weeks from benefit week ending May 14, 2005 to benefit week ending July 9, 2005.

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(1)(28) 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:

(1) The claimant's lack of transportation to the work site unless the employer had agreed to furnish transportation.

(28) The claimant left after being reprimanded.

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit. The claimant seems to maintain that she was discharged, but did not participate in the hearing and provide evidence that she was discharged. The employer's witness, David Duncan, Complex Human Resources Manager, credibly testified that the claimant was brought into the human resources office on April 27, 2005, concerning her attendance. She was informed at that time that she was being placed on an indefinite suspension but that she should return the next day, April 28, 2005, at 9:00 a.m. and meet with human resources to decide what the employer had decided about the claimant's continued employment. The claimant did not show up that day, nor did she come in at that time on the following day, April 29, 2005. Later on April 29, 2005, the claimant came in and completed an exit interview indicating that she was discharged. However, no one at the employer had ever told the claimant that she was discharged. Under the evidence here, the administrative law judge is constrained to conclude that the claimant voluntarily left her employment when she failed to return to the employer, as instructed, on April 28, 2005, at 9:00 a.m. There is no evidence that prior to that time the claimant had ever been told that she was discharged or fired. Accordingly, the administrative law judge concludes that the claimant voluntarily left her employment effective April 29, 2005. 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. The claimant did not participate in the hearing and provide reasons attributable to the employer for her quit. The evidence establishes that the claimant quit after being reprimanded for her attendance on April 27, 2005. Leaving work voluntarily because of a reprimand is not good cause attributable to the employer. There is no evidence that the claimant's working conditions were unsafe, unlawful, intolerable, or detrimental, or that she was subjected to a substantial change in her contract of hire. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective April 29, 2005, 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, and would still be disqualified to receive unemployment insurance benefits. The evidence establishes that the claimant was absent on April 28 and 29, 2005, as a no-call/no-show. The evidence also establishes the claimant was tardy on April 13 and 21, 2005, without proper excuse. The claimant stated that she had personal business on April 21, 2005, and that she had an appointment on April 13, 2005. The claimant was excused later on April 13, 2005, to go to a doctor's appointment, so the administrative law judge must conclude that the earlier appointment was not for a medical appointment. The claimant was absent on April 11, 2005, for personal illness, but she called in late. The claimant was tardy on March 29, 2005, two hours and six minutes because she took her mother to the bus station. The claimant was tardy on April 7, 2005, two hours because of transportation. In the absence of any evidence to the contrary, the administrative law judge must conclude that the above absences and tardies were not for reasonable cause and/or not properly reported and establish excessive unexcused absenteeism and disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for excessive unexcused absenteeism, which is disqualifying misconduct, and the claimant would still be disqualified to receive unemployment insurance 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 unemployment insurance benefits in the amount of \$2,223.00 since separating from the employer herein on or about April 29, 2005, and filing for such benefits effective May 8, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of June 6, 2005, reference 01, is reversed. The claimant, Lontay S. Riley, is not entitled to receive unemployment insurance benefits, until or unless she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. She has been overpaid unemployment insurance benefits in the amount of \$2,223.00.

kjw/kjw