

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

VANESSA C CHAVEZ
21 N WINDSOR CIR
STORM LAKE IA 50588

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

Appeal Number: 06A-UI-01398-JTT
OC: 12/18/05 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

STATEMENT OF THE CASE:

Tyson Fresh Meats filed a timely appeal from the January 26, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 22, 2006. Storm Lake Complex Human Resources Director Will Sager represented Tyson. Claimant Vanessa Chavez did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Vanessa Chavez was employed by Tyson Fresh Meats as a full-time production worker from January 27, 2005 until June 13, 2005, when Human Resources Director Lonnie Jepsen discharged her.

The final incident that prompted the discharge came to the employer's attention on May 18, 2005 when an employee contacted Tyson's ethics hotline to report that Ms. Chavez was working for Tyson under a false name and that her actual first name was Patricia. The caller did not know the actual last name. The caller identified himself during the call, but the employer did not interview the caller. The call came to the attention of Human Resources Director Lonnie Jepsen, who forwarded the information to Storm Lake Complex Human Resources Manager Will Sager. The employer authorized Mr. Sager to utilize Tyson's protocol regarding employees suspected of being non-documented aliens.

On June 7, Mr. Sager summoned Ms. Chavez to a meeting at which he made Ms. Chavez aware of the investigation regarding her identity. Pursuant to the protocol, Mr. Sager advised Ms. Chavez that she would be suspended from work for three days to allow her the opportunity to gather documentation regarding her identity. Mr. Sager instructed Ms. Chavez that one resource for such documentation would be the local Social Security Administration office. Mr. Sager advised Ms. Chavez that a birth certificate would be another acceptable document. Mr. Sager advised Ms. Chavez that she would be given until the end of June 10, 2006 to present documentation of her identity to the employer. As of the end of June 13, 2006, the employer still had not heard from Ms. Chavez and terminated the employment. The employer never again heard from Ms. Chavez. Ms. Chavez had not received any reprimands in the course of the employment.

Ms. Chavez established a claim for benefits that was effective December 18, 2005, but to date has not received any benefits.

REASONING AND CONCLUSIONS OF LAW:

Based on the evidence in the record, the administrative law judge cannot consider this matter as a possible quit. The employer testified, and the administrative law judge found, that the employer discharged Ms. Chavez immediately after a period of suspension initiated by the employer.

The question is whether the evidence in the record establishes that Ms. Chavez was discharged for misconduct in connection with the employment. It does.

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).

Since the claimant was discharged, the employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act to misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

The preponderance of the evidence establishes that Ms. Chavez perpetrated a fraud upon the employer and the United States government by working under an assumed identity while actually being a non-documented alien disqualified from working in the United States. The evidence indicates that once the matter was brought to Ms. Chavez's attention, Ms. Chavez's took no steps to respond to the employer's reasonable concerns and reasonable requests for documentation. Ms. Chavez's failure to provide any response whatsoever to the employer corroborated the employer's suspicion. Based on the preponderance of the evidence, the administrative law judge concludes Ms. Chavez engaged in willful and wanton disregard of the interests of the employer and in substantial misconduct by perpetrating a fraud upon the employer regarding her identity.

The next consideration is whether Ms. Chavez's conduct constituted a current act. See 871 IAC 24.32(8). The evidence in the record indicates that the employer became aware of Ms. Chavez's possible undocumented status on May 18 but waited until June 7 to suspend Ms. Chavez from the employment pending investigation. Though the employer waited 20 days

to act upon the information, the misconduct was ongoing in nature and continued up to the time of separation. The administrative law judge concludes that the conduct did in fact constitute a current act.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Chavez was discharged for misconduct. Accordingly, Ms. Chavez is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged.

The administrative law judge would be willing to reopen the record and provide Ms. Chavez an opportunity to present evidence regarding her documented status. Any request to reopen the record would need to be in writing, received within 15 days of the mailing date of the decision, and provide good cause for Ms. Chavez's failure to participate in the appeal hearing. Any written request to reopen the record should be accompanied by written documentation of Ms. Chavez's identity.

DECISION:

The Agency representative's decision dated January 26, 2006, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

jt/s