

BEFORE THE  
EMPLOYMENT APPEAL BOARD  
Lucas State Office Building  
Fourth floor  
Des Moines, Iowa 50319

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HAO WANG

Claimant,

and

TYSON FRESH MEATS INC

Employer.

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HEARING NUMBER: 08B-UI-07047

EMPLOYMENT APPEAL BOARD  
DECISION

NOTICE

**THIS DECISION BECOMES FINAL** unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

**SECTION: 96.5(1)**

DECISION

**UNEMPLOYMENT BENEFITS ARE DENIED**

The claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member concurring, one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

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Monique F. Kuester

**CONCURRING OPINION OF ELIZABETH L. SEISER:**

I agree with my fellow board member that the administrative law judge's decision should be affirmed; however, I would modify the decision by finding that the facts of this case warrant a dual analysis. The claimant's separation could also be characterized as a discharge for which misconduct was established. The employer allowed the claimant to take leave to China. Once it became known that the claimant was experiencing difficulty returning to the States, the claimant was, specifically, instructed to "keep [the employer] in the loop..." (Tr. 3) which he failed to do after May 19th, which was the day he was originally scheduled to return. (Tr. 2) The employer didn't actually hear from him, again, until June 5<sup>th</sup>. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). Failure to follow the reasonable instructions of the employer could be misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). The employer testified that he believed that the claimant had *no* intention to quit (Tr. 5); thus, we can reasonably conclude that this separation was initiated by the employer (discharge). See, 871 IAC 24.1(113) "c".

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Elizabeth L. Seiser

AMG/ss

**DISSENTING OPINION OF JOHN A. PENO:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The claimant definitely did not voluntarily quit his employment. He made every effort to stay in contact the employer by making approximately twenty calls to the employer. The claimant was told at the Omaha Airport that he had proper documentation to travel to China. He reasonably believed he was informed by a person of authority. (Tr. 16) When the claimant tried to leave China, he was not allowed to leave because he did not have his green card. It took the claimant approximately six weeks to obtain proper documentation to return to the U.S. The claimant notified the employer the first morning of his return, as he had no intention to quit his job. Rather, it was the employer who initiated his separation. As such, I would conclude the claimant was discharged for failing to return to work. While the employer may have compelling business reasons to

terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

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Any reasonable person would believe that if airport personnel okayed documentation to leave the country, that that same documentation would allow passage to return. At worst, the claimant may have used poor judgment; however, his action did not rise to the legal definition of misconduct such that he should be denied benefits.

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John A. Peno

AMG/ss