

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

FILEPE CHAVEZ  
6720 S TRIPP  
CHICAGO IL 60629

TYSON FRESH MEATS INC  
c/o FRICK UC EXPRESS  
P O BOX 00283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-01397-B4T  
OC: 01-04-04 R: 12  
Claimant: Appellant (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Filepe Chavez appealed from an unemployment insurance decision dated February 3, 2004, reference 02, that held, in effect, the claimant was discharged for misconduct in connection with his employment at Tyson Fresh Meats, Inc. on December 31, 2003 and unemployment insurance benefits were denied.

A telephone conference hearing was scheduled and held on February 24, 2004, pursuant to due notice. Filepe Chavez participated. Jim Petzholdt, Human Resources Manager at Storm Lake, Iowa, participated on behalf of Tyson Fresh Meats, Inc.

Official notice was taken of the unemployment insurance decision dated February 3, 2004, reference 02, together with the pages attached thereto (nine pages in all).

#### FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that: Filepe Chaves was employed on or about April 1, 2003 as a full-time employee with Tyson Fresh Meats, Inc. in Storm Lake, Iowa. The employer had adopted a point policy relating to instances of absenteeism and tardiness. The claimant was aware of the policy and may have been provided a copy of same at the time of his employment.

During the tenure of the claimant's employment he was issued letters on two occasions, the last being September 29, 2003, regarding his accumulation of points due to alleged instances of absenteeism and tardiness.

The employer did not provide specific dates of instances of absenteeism whereby the claimant would accumulate points, nor were the reasons for the claimant's absence specified.

In early December 2003 the claimant made arrangements to travel to Chicago to visit with his mother and family. The claimant held a conversation with Tim Boak, Assistant Manager, prior to December 24, 2003. The claimant requested time off to visit his family in Chicago and was granted time off by Tim Boak, Assistant Manager. The claimant was not scheduled to work on December 24, 2003 or December 25, 2003. The claimant was absent from an assigned work shift on December 26 and December 27, 2003 pursuant to his request to visit his family in Chicago, which was granted by Tim Boak. The claimant then returned to work after the Christmas holiday and was called to a meeting on or about December 29, 2003. The claimant was questioned about being absent on December 26 and December 27. The claimant made an effort to explain that he was authorized to travel to Chicago to see his family. Subsequently, on or about December 31, 2003 the claimant was discharged from his employment by Joel Gravybill, Product Supervisor. The claimant had provided information regarding his flight to Chicago to the employer.

#### REASONING AND CONCLUSIONS OF LAW:

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, (7) 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).

(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.

An employer may adopt whatever rules it desires with respect to absenteeism and tardiness, as well as a point system policy. The employer has failed to provide data regarding the incidents of absenteeism and tardiness upon which the claimant accrued the alleged points under the employer point system. While the claimant was warned on several occasions regarding his accumulation of points, the last incidents of absenteeism and tardiness apparently occurred on December 26 and December 27. The claimant's testimony is believable and undisputed regarding the authorization of Tim Boak, Assistant Manager, to go to Chicago to visit with his family over the holiday. The employer chose not to provide the testimony or other written statements from Tim Boak, Assistant Manager, or anyone else who had personally contacted the claimant regarding the alleged absenteeism and tardiness.

871 IAC 24.32(8) provides:

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

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 evidence in the record indicates that the claimant was warned on occasion for incidents of absenteeism and tardiness. However, the termination must be based on a current act of misconduct.

The last instances of absenteeism and tardiness occurred on December 26 and December 27, as established by the record. The claimant's testimony is believable, in that Tim Boak, Assistant Manager, authorized him to be absent to visit his family in Chicago.

Under such circumstances, the record does not establish that the claimant intended to disregard a duty owed to the employer. Excessive unexcused absenteeism has not been established and the termination of the claimant's employment was not based upon a current act.

The administrative law judge concludes Filepe Chavez was discharged from his employment with Tyson Fresh Meats, Inc. on or about December 31, 2003 for on disqualifiable reason within the intent and meaning of Iowa Code Section 96.5-2-a and the foregoing sections of the Iowa Administrative Code.

DECISION:

The unemployment insurance decision dated February 3, 2004, reference 02, is reversed. Filepe Chaves was discharged from his employment with Tyson Fresh Meats, Inc. on December 31, 2003 for no disqualifiable reason and unemployment insurance benefits are allowed, provided the claimant is otherwise eligible under the provisions of the Iowa Employment Security Law.

b/b