

**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**

**SALVADOR FARIAS  
1108 KELVIN RD APT 2  
STORM LAKE IA 50588**

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

**Appeal Number: 04A-UI-10702-RT  
OC: 09-05-04 R: 01  
Claimant: Appellant (5)**

**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 96.5-1 – Voluntary Quitting  
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Salvador Farias, filed a timely appeal from an unemployment insurance decision dated September 27, 2004, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on November 1, 2004 with the claimant participating. Moe Gonzalez was available to testify for the claimant but not called because his testimony would have been repetitive and unnecessary and, further, he had no personal knowledge of the matters herein. Matt Chase, employment manager, participated in the hearing for the employer, Tyson Retail Deli Meats, Inc. 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 witnesses 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 laborer from December 3, 2002 until he separated from his employment on or about September 7, 2004. On August 30 and August 31, 2004, the claimant was absent because he was in jail. The claimant was in jail for a public intoxication offense unrelated to his employment and no one forced him to commit the offense. However, the claimant's sister called in and informed the employer that the claimant was absent because of illness. On September 1, 2004, the claimant was absent because he felt sick. He called in and informed the employer of this. When the claimant returned to work and the employer learned from the newspaper that he had been in jail, the employer confronted the claimant and, when the claimant conceded that he had been in jail, the employer terminated the claimant. The claimant was also tardy on June 26, 2004 and April 7, 2004. The claimant was also absent on May 24, 2004 for personal illness and this was properly reported. The claimant received three warnings for his attendance: on September 29, 2003; October 27, 2003; and April 15, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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(16) 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:

- (16) The claimant is deemed to have left if such claimant becomes incarcerated.

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) provide:

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.

The first issue to be resolved is the character of the separation. Although both the employer's witness, Matt Chase, employment manager, and the claimant testified that the claimant was discharged, the administrative law judge concludes, that the claimant, in effect, voluntarily quit. Both witnesses testified that the claimant was in jail for at least two days. A claimant is deemed to have left his employment if such claimant becomes incarcerated. Here, the claimant was incarcerated for at least two days and missed work for those two days because of public intoxication which is unrelated to his employment. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily. The issue then becomes whether the claimant left his employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that he has left his 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 his burden of proof to demonstrate by a preponderance of the evidence that he left his employment with the employer herein with good cause attributable to the employer. The only

reason for the claimant's voluntary quit was his absences while he was incarcerated and this is not good cause attributable to the employer. The claimant agreed that he was arrested and incarcerated for public intoxication which was unrelated to his employment. Accordingly, the administrative law judge concludes that the claimant left his employment voluntarily without good cause attributable to the employer, and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he 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. First, the claimant falsified, or had his sister falsify, the reason for two absences when his sister called the employer and said the claimant was sick when, in fact, the claimant was in jail. The administrative law judge concludes that this alone is a deliberate act or omission constituting a material breach of his duties and evinces a willful or wanton disregard of the employer's interests and is, at the very least, carelessness or negligence in such a degree of recurrence, all as to establish disqualifying misconduct. Further, the evidence establishes that the claimant was absent on August 30 and August 31, 2004 and September 1, 2004. At least two of those days were because he was in jail. The claimant testified that he was absent on September 1, 2004 because he was feeling sick but this is not credible to the administrative law judge since the claimant had just gotten out of jail and had informed the employer that he was ill when he had been in jail. Further, the claimant had two tardies as set out in the findings of fact. The administrative law judge would also conclude that the claimant's absences and tardies here were not for reasonable cause and not properly reported and were excessive unexcused absenteeism and also disqualifying misconduct. Accordingly, even if the claimant's separation should be characterized as a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct and would still be disqualified to receive unemployment insurance benefits.

**DECISION:**

The representative's decision of September 27, 2004, reference 01, is modified. The claimant, Salvador Farias, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he left his employment voluntarily without good cause attributable to the employer when he was incarcerated.

tjc/tjc