IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

GABINO LIMON
Claimant

ASHLEY INDUSTRIAL MOLDING INC
Employer

APPEAL NO. 17A-UI-02397-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/12/17
Claimant: Appellant (2)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Gabino Limon filed a timely appeal from the February 28, 2017, reference 01, decision that disqualified him for benefits and that relieved the employer of liability for benefits, based on the claims deputy's conclusion that Mr. Limon was discharged on February 14, 2017 for excessive unexcused absenteeism after being warned. After due notice was issued, a hearing was held on March 27, 2017. Mr. Limon participated. The employer did not comply with the hearing notice instructions to register a telephone number for the hearing and did not participate. Exhibit A was received into evidence.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Gabino Limon was employed by Ashley Industrial Molding, Inc. as a full-time Level 2 Painter and Quality Inspector from 2013 until February 14, 2017, when Janelle Smith, Human Resources Manager, discharged him for attendance. Mr. Limon's immediate supervisor was Dan Ellis, Paint Line Supervisor. Mr. Limon's regular work hours were 6:00 a.m. to 4:00 p.m., Monday through Thursday. Toward the end of the employment, the employer had Mr. Limon working overtime by working a 6:00 a.m. to 4:00 p.m. shift on Fridays. If Mr. Limon needed to be absent from work, the employer's policy required Mr. Limon to telephone the plant at least 30 minutes prior to the start of his shift. The employer assigned attendance points to absences. If Mr. Limon accrued nine attendance points, he was subject to discharge from the employment. Mr. Limon could eliminate an attendance points by going 45 days without any absences.

The final absence that triggered the discharge occurred on February 13, 2017, when Mr. Limon was absent due to transportation and other personal issues. On that day, the employer with whom Mr. Limon ordinarily caught a ride to work did not go to work. Mr. Limon decided to take the day off so that he could go to the clerk of court's office and file a response to a debt-collection suit. Mr. Limon properly notified the employer of the absence.

On January 19, 2017, Mr. Ellis had issued a "Final Written Warning" to Mr. Limon for attendance. The document contained wherein the employer was supposed to set forth the number of attendance points that Mr. Limon had at that point. However, that space in the reprimand had been left blank. Mr. Limon pointed this out to Mr. Ellis and asked Mr. Ellis for an update of his attendance points. Mr. Ellis told Mr. Limon that he had seven attendance points. Mr. Limon knew from past experiencing that having eight attendance points would not subject him to discharge. Mr. Limon also knew that he had been able to decrease his attendance points by at least five through perfect attendance between April 14, 2016 and October 11, 2016. Despite the employer's characterization of the January 19 reprimand as a "Final Written Warning," Ms. Limon assumed his absence on February 13, 2017 would not cost him his job because, based on the information from Mr. Ellis, it would only result in him having eight attendance points.

Additional absences factored in Ms. Smith's decision to discharge Mr. Limon from the employment. Mr. Limon's next most absence occurred on January 16, 2017, when Mr. Limon and several other employees were absent due to icy roads and a travel advisory. Mr. Limon properly reported the absence. Mr. Limon had left work early on January 12, 2017, to take his 13-year-old daughter to a medical appointment. Mr. Limon properly notified the employer of his need to be absent. In 2016, Mr. Limon had also been absent on February 4, missed part of his shift on February 29, and had been absent on November 3, November 29, and December 21 for reasons he cannot recall. Mr. Limon asserts that he did not miss work unless it was due to his personal illness or his child's illness.

When Mr. Limon appeared for work on February 14, 2017, Mr. Ellis summoned Mr. Limon to a meeting. Ms. Smith was present for the meeting by telephone. During the meeting, Ms. Smith notified Mr. Limon that he was discharged from the employment. In conversation with Mr. Ellis, Mr. Limon reminded Mr. Ellis that Mr. Ellis had told Mr. Limon on January 19 that he only had seven attendance points. Mr. Ellis advised that he too was surprised by the discharge. Mr. Ellis agreed to speak to the plant manager on Mr. Limon's behalf. Later that day, Mr. Ellis told Mr. Limon that he was unable to prevent Mr. Limon from being discharged from the employment.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

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 of 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). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See *Crosser v. Iowa Dept. of Public Safety*, 240 N.W.2d 682 (Iowa 1976).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Employers may not graft on additional requirements to what is an excused absence under the law. See *Gaborit v. Employment Appeal Board*, 743 N.W.2d 554 (Iowa Ct. App. 2007). For example, an employee's failure to provide a doctor's note in

connection with an absence that was due to illness properly reported to the employer will not alter the fact that such an illness would be an excused absence under the law. *Gaborit*, 743 N.W.2d at 557.

The employer did participate in the hearing and did not present any evidence to support the allegation that Mr. Limon was discharged for excessive unexcused absences or other disqualifying misconduct. The evidence in the record establishes a single absence that was an unexcused absence under the applicable law. That was the final absence when Mr. Limon was absence for matters of personal responsibility including transportation and responding to a debt collection cause of action. The employer presented no evidence to establish additional absences that would be unexcused absences under the applicable law.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Limon was discharged for no disqualifying reason. Accordingly, Mr. Limon is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 28, 2017, reference 01, decision is reversed. The claimant was discharged on February 14, 2017 for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

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James E. Timberland
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs