

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

MARIO A FLORES
Claimant

IAC IOWA CITY LLC
Employer

APPEAL NO. 14A-UI-10203-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/22/13
Claimant: Appellant (2)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated September 26, 2014, reference 06, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on October 20, 2014. Claimant participated personally, and was represented by counsel Paul McAndrew. Employer participated by Shane Luxton. Employer's Exhibits One through Fourteen and Claimant's Exhibit A were admitted into evidence.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct?

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant last worked for employer on September 8, 2014. Employer discharged claimant on September 8, 2014 because of excessive absences and tardiness.

Claimant received an employee manual from employer when he was first hired. The manual received gave information regarding employer's progressive disciplinary policy. Claimant was told during his orientation that doctor's excuses would only be accepted for injuries on the job; that they would not be accepted for other family member's problems.

Claimant is a person who came to this country in 2001. Claimant speaks both English and Spanish, but does not read English. When claimant was first employed by employer, he received a power point presentation on attendance policy and other company issues which may or may not have included FMLA issues. Employer did not have anyone testify as to the specifics of the new hire meeting.

Claimant's girlfriend, whom he holds out as his wife, has suffered numerous issues with her recent pregnancy. These issues caused claimant to be late and absent from work to such an

extent that he earned points under the progressive disciplinary policy in excess of those allowed by employer. Claimant attempted to bring doctor's notes to employer, but these notes do not matter under the disciplinary policy, and only concerned claimant's girlfriend and not his wife.

Employer did not have any witnesses that would have been present at the presentation of any of the introductory meetings for new employees. As employer's only witness was hired at or around the time of claimant's termination, he could not attest to the particulars of anything discussed at the introductory seminar over and above what the exhibits stated. Claimant testified that a number of issues, including FMLA information, was not covered at the introductory seminar.

Employer did state that claimant had not worked for a long enough of a period, nor worked enough hours at the time of termination to be eligible for FMLA benefits.

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).

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. 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. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Dep't of Job Serv., 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Dep't of Job Serv., 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Dep't of Job Serv., 425 N.W.2d 679 (Iowa Ct. App. 1988).

Unemployment benefits are not available to an individual who was discharged for misconduct in connection with his or her job. Iowa Code § 96.5(2). Courts have recognized a distinction between the word "misconduct" in labor law and "misconduct" as defined for unemployment compensation purposes. Misconduct serious enough to warrant an employer to fire an employee is not necessarily serious enough to warrant the forfeiture of compensation benefits. Breithaupt v. Emp't Appeals Bd., 453 N.W.2d 532, 535 (Iowa 1990). Misconduct sufficient to disqualify a claimant from receiving unemployment benefits "connotes some deliberate action or omission or such carelessness as to indicate a wrongful intent." Billingsley v. Iowa Dep't of Job Serv., 338 N.W.2d 538, 540 (Iowa Ct. App. 1983). "The focus is on deliberate, intentional or culpable acts by the employee." Gimbel v. Emp't Appeal Bd., 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism and tardiness.

Claimant was warned concerning this policy, but was not given information in a manner that he could understand as claimant does not read English.

The last incident, which brought about the discharge, fails to constitute misconduct because claimant had not willfully absented himself from work without an excuse. Claimant had offered to bring doctor's notes for the times he was late or absent. The fact that employer has a policy that does not allow for doctor's excuses does not eliminate the requirement in the laws of this state that a claimant's absences must be unexcused. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated September 26, 2014, reference 06, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/css