

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LUIS A LOPEZ**  
Claimant

**APPEAL NO. 17A-UI-00366-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WELLS ENTERPRISES INC**  
Employer

**OC: 12/18/16**  
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

Luis Lopez filed a timely appeal from the January 5, 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. Lopez had been discharged for violation of a known company rule. After due notice was issued, a hearing was held on February 1, 2017. Mr. Lopez participated. The employer did not register a telephone number for the hearing. The administrative law judge nonetheless contacted the named Equifax Hearing Representative, Jacqueline Jones, at the time of the hearing. Ms. Jones discontinued her participation in the hearing prior to the presentation of evidence and because she had no witness for hearing. Exhibit A was received into evidence.

The hearing in this matter was scheduled for 2:00 p.m. on February 1, 2017. The Appeals Bureau mailed a hearing notice to the employer's address of record on January 17, 2017. The employer's address of record is one of Equifax's post office boxes in Saint Louis, Missouri. Neither the employer nor the employer representative complied with the hearing notice instructions to register a telephone number for the hearing. At 3:54 p.m. January 31, 2017, shortly before the end of the business day and one day prior to the hearing, Equifax Hearing Representative Jacqueline Jones faxed a hearing postponement request to the Appeals Bureau. The administrative law judge received the request at 9:54 a.m. on February 1, a little more than four hours prior to the scheduled appeal hearing. The postponement request stated, in relevant part:

The employer is requesting a postponement re: the upcoming hearing scheduled because their first hand witness Javier Rojas is on a Leave of Absence. The employer believed that they could get someone else to participate in his absence but determined that he was the person with firsthand knowledge of the final incident that led to the separation from the employment. Therefore that is the reasoning re: the request for the postponement.

Shortly before noon, the administrative judge contacted Ms. Jones to obtain additional information for consideration in ruling on the untimely postponement request. Iowa Administrative Code rule 871 IAC 26.8(2) provides as follows:

A hearing may be postponed by the presiding officer for good cause, either upon the presiding officer's own motion or upon the request of any party in interest. A party's request for postponement may be in writing or oral, provided the oral request is tape-recorded by the presiding officer, and is made not less than three days prior to the scheduled hearing. A party shall not be granted more than one postponement except in the case of extreme emergency.

In speaking with Ms. Jones regarding the employer's untimely postponement request, the administrative law judge learned that Ms. Jones had also been concerned about the lack of information the employer had provided to her when the employer contacted her on January 31, 2017 to have her request that the February 1 hearing be cancelled or postponed. At the time Ms. Jones had solicited additional information from the employer, she notified the employer that the untimely postponement request might be denied. Ms. Jones had requested additional information from the employer to support the request, but the employer had not provided additional information, only that Mr. Rojas was on a leave of absence. The administrative law judge advised Ms. Jones that the postponement would be denied for three reasons. These included untimeliness of the request and the absence of good cause in making the request. The reason for denying the request included the lack of information provided by the employer in making the request, including the lack of information provided even after Ms. Jones solicited additional information from the employer to support the request. The third and most important reason for denying the postponement request was the impact of postponement on the claimant, who had established his claim the week that started December 18, 2016 and who had been without wages or unemployment insurance benefits for several weeks. The administrative law judge left the door open for the employer to present alternative witnesses at the hearing or to substantiate its postponement request at the time of the hearing. The employer did neither.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Luis Lopez was employed by Wells Enterprises, Inc. on a full-time basis from 2011 until December 19, 2016, when human resources representative Javier Rojas notified him that he was discharged from the employment for alleged no-call/no-show absences the week before. Mr. Lopez's work hours were 3:25 a.m. to 1:55 p.m. Depending on the level of business, the employer would have Mr. Lopez work Monday through Thursday, Monday through Friday or Monday through Saturday. Mr. Lopez's immediate supervisor at the end of the employment was John. Mr. Lopez does not know John's last name. John had only recently become Mr. Lopez's supervisor. Mr. Lopez last performed work for the employer on Thursday, December 8, 2016.

On Sunday December 11, 2016, Mr. Lopez went to the workplace to review the posted schedule for the upcoming two weeks. Mr. Lopez saw that he was not scheduled to work at all during the work week that began Monday, December 12. Mr. Lopez had not requested the week off and did not know why he had been left off the schedule for that week. Mr. Lopez also saw that he was on the schedule to work his regular hours during the work week that began Monday, December 19.

On Monday, December 12, 2016, Mr. Lopez telephoned John to ask why he was not on the schedule for the work week that began December 12. John did not know why Mr. Lopez was not scheduled to work that week. John indicated that he would get back to Mr. Lopez.

When Mr. Lopez had not heard back from John by Wednesday, December 14, 2016, he called human resources representative Javier Rojas. By that point, Mr. Lopez had decided he was okay with being off the schedule that week. Mr. Lopez's brother has leukemia, lives on the east coast, and the brother's disease had recently taken a turn for the worse. Mr. Lopez was considering traveling to see his brother during the week when he was not on the schedule to work. When Mr. Lopez spoke with Mr. Rojas, he told Mr. Rojas that he actually wanted to make sure that he remained off the schedule for the remainder of that week due to his brother's illness. Mr. Rojas told Mr. Lopez that he would discuss the matter with John and get back to Mr. Lopez. Mr. Lopez subsequently received word from his mother and sister indicating that his brother's condition had stabilized. Mr. Lopez decided not to travel to see his brother.

Mr. Lopez next heard from the employer on the afternoon on December 16, 2016 when Mr. Rojas left him a voicemail message. In the message, Mr. Rojas indicated that he had spoken with John and that Mr. Lopez was on the schedule to work on Monday, December 19, 2016.

On Monday, December 19, 2016, Mr. Lopez went to the workplace to work his shift and attempted to enter the facility by scanning his employee badge. The employer had deactivated Mr. Lopez's badge. When Mr. Lopez could not enter the work facility, he returned home and attempted to call his supervisor John. John did not answer. Mr. Lopez waited until 8:05 a.m. and then tried to call Mr. Rojas at the employer's human resources office. Mr. Rojas was not there. Within an hour or so, Mr. Lopez was able to speak with Mr. Rojas. Mr. Lopez told Mr. Rojas that he had tried to report for work, but that his badge would not work to let him into the building. Mr. Rojas notified Mr. Lopez that he was discharged from the employment and asserted that Mr. Lopez had been a no-call/no-show during the entire previous week. Mr. Lopez argued that he had not even been on the schedule the previous week. Mr. Lopez referred to Mr. Rojas' message on December 16. These statements did not persuade Mr. Rojas to change his position on the matter. Mr. Rojas told Mr. Lopez he would be willing to give Mr. Lopez a job in six months, but "that's the way we have to do it."

#### **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 evidence in the record establishes that the employer discharged Mr. Lopez for attendance. The employer has presented no evidence to establish any unexcused absences. The evidence indicates that the absences that triggered the discharge occurred during the work week that started December 12, 2016, but that Mr. Lopez was not on the schedule to work that week. Because Mr. Lopez was not on the schedule to work during the work week that began December 12, 2016, it is difficult to see how he could have deemed absent from any shifts during that week. The evidence establishes that Mr. Lopez promptly contacted the employer to ask why he was not on the schedule for the week that started December 12, that his supervisor did not have an answer for him, that the supervisor indicated he would get back to Mr. Lopez, but that the supervisor never did get back to Mr. Lopez. Mr. Lopez again contacted the employer on Wednesday, December 14, by contacting a human resources representative, Mr. Rojas. By that time, Mr. Lopez had been off work for all of December 12 and 13 and a substantial portion of his shift on December 14. The human resources representative did not tell Mr. Lopez at that time to report for work. Mr. Lopez decided to use the week of no scheduled shifts to attend to a family matter. The employer followed up that Friday with a message indicating that Mr. Lopez was set to report for work on Monday, December 19.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Mr. Lopez was discharged on December 19, 2016 for no disqualifying reason. Accordingly, Mr. Lopez is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits paid to Mr. Lopez.

**DECISION:**

The January 5, 2017, reference 01, decision is reversed. The claimant was discharged on December 19, 2016 for no disqualifying reason. The claimant is eligible for benefits, provided he meets all other eligibility requirements. The employer's account may be charged for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

jet/rvs