

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JESUS R GARCIA
Claimant

APPEAL NO. 09A-UI-10029-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CUSTOM-PAK INC
Employer

OC: 06/07/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

Custom-Pak, Inc. filed a timely appeal from a representative's decision dated July 8, 2009, reference 01, which held the claimant eligible to receive unemployment insurance benefits. After due notice, a telephone hearing was scheduled for and held on July 29, 2009. The claimant participated personally. The employer participated by Ms. Lynn Curtis, Human Resource Administrator and Ms. Stormy Melton, Benefit Administrator. Employer's Exhibits One through Nine were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered the evidence in the record, finds: Jesus Garcia was employed as a full-time machine operator for Custom-Pak, Inc. from October 21, 2008 until February 10, 2009 when he was discharged for exceeding the permissible number of attendance infractions under the company's "no fault" attendance policy. The claimant was aware of the policy. Under the policy's terms employees are subject to discharge if they accumulate eight infraction points within a six-month period.

Mr. Garcia had been absent on each occasion due to the hospitalization of his wife or the illness of his children. The claimant called in to his immediate supervisor because he worked on the third shift and had not been able to reach the company's personnel department due to the nighttime hours. The claimant had been authorized by his immediate supervisor to make direct contact. On each occasion the claimant reported the reason for his absence being related to illness or injury. The claimant had been reassured by his immediate supervisor that the attendance infractions were not being held against him.

The claimant's final attendance infraction took place when he did not report for work on February 5, 6, or 9, 2009. The claimant had reported to his immediate supervisor that his

children were ill with the chicken pox and he was required to remain with them as he was a single parent at the time and had no other care for his sick children. At the time of discharge the claimant was informed by his immediate supervisor that he was being discharged because business conditions were "slow."

Because the claimant had been authorized by his immediate supervisor to use direct communication to report impending absences the reasons for absences were not readily available to the company's human resource department and the claimant's absences were therefore categorized as absence due to "personal business." When the claimant had exceeded the permissible number of attendance infractions by his absence on February 9, a decision was made to terminate Mr. Garcia from employment. No warnings had been served upon the claimant as he had been absent on the two preceding work days, February 5, and 6th and, therefore, was not present to receive warnings from the company. Subsequent to the decision to terminate Mr. Garcia for his attendance infractions, the company became aware that the claimant had been arrested over the weekend for possession of a controlled substance. The claimant's arrest and incarceration had taken place over a weekend period when the claimant had not been scheduled to work. It is the employer's position that if he had not been discharged for attendance infractions, the claimant would have been discharged under the company's encompassing drug policies that cover non-work-related conduct.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes that the claimant was discharged for no disqualifying reason.

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 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.

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 this case is highly disputed. Mr. Garcia appeared personally and testified under oath that he personally reported each impending absence directly to his immediate supervisor and was given specific authority by his supervisor to do so. The claimant further testified that each absence was related to the illness of family members and was properly reported. Mr. Garcia further testified that his immediate supervisor had reassured the claimant that the absences were understandable and that Mr. Garcia should not worry about continued employment. The employer relies primarily on hearsay testimony. Although hearsay is admissible in administrative proceedings it cannot be accorded the same weight as sworn direct testimony.

The evidence in the record establishes that because the claimant had used an alternative method of direct communication with his supervisor to report impending absences, the company listed "personal business" for each absence when in fact the absences were related to illness that was properly reported. The claimant testified under oath that his final attendance infraction was due to the illness of his children and that due to the nature of his third shift work he was required to be at home with them to provide care during the nighttime hours. The evidence in the record indicates that the claimant's final attendance infraction was properly reported to the company following the method of reporting that had been authorized by Mr. Garcia's immediate supervisor.

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) holds excessive unexcused absenteeism is one form of misconduct. The Court held that the absences must be both excessive and unexcused. The Court further held, however, that absence due to illness or other excusable reasons is deemed excused if the employee properly notifies the employer. In determining whether a claimant's attendance infractions are disqualifying the administrative law judge also considers the circumstances, in this case, the illness of family members, especially small children. The administrative law judge, therefore, concludes that as the claimant's last attendance infraction was due to the illness of the claimant's children and properly reported, the claimant was discharged for no disqualifying reason.

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 insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate intentional culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

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). While 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 deficiency in that party's case. See Crosser v. Iowa Department of Public Safety, 240 N.W.2d 682 (Iowa 1976). The employer in this case did not present any firsthand witnesses with direct knowledge of the claimant's reporting practices or the instructions given to him by his supervisor.

871 IAC 24.32(8) provides that the termination of employment must be based on a current act. The decision by the company to terminate Mr. Garcia was based upon his attendance infractions and were not based upon any possible violation by the claimant of the employer's comprehensive drug policy, the conduct that may have occurred while off duty and away from the work place.

While the decision to terminate Mr. Garcia may have been a sound decision from a management viewpoint, for the reasons stated herein the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Benefits are allowed, providing the claimant is otherwise eligible.

Based upon the evidence in the record the administrative law judge concludes that there may be a serious question regarding the claimant's availability for work due to ongoing child care responsibilities. This matter may be a subject of investigation by workforce development to determine whether the claimant is able and available for work while claiming unemployment insurance benefits.

DECISION:

The representative's decision dated July 8, 2009, reference 01, is affirmed. The claimant was discharged for no disqualifying reasons. Benefits are allowed, providing the claimant meets all other eligibility requirements.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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