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

Appeal Number: 06A-UI-03183-JT
OC: 02/19/06 R: 02
Claimant: Appellant (2)

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, 4th 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.

RICHARD A LEWIS
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DES MOINES IA 50315-5550

HY-VEE INC
C/O TALX UCM SERVICES INC
PO BOX 283
ST LOUIS MO 63166-0283

TALX UC EXPRESS
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_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant Richard Lewis filed a timely appeal from the March 9, 2006, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on April 13, 2006. Mr. Lewis participated. David Williams of TALX UC eXpress represented Hy-Vee and presented testimony through Manager of Perishables Chad Adams, Kitchen Manager James McCaffey and Kitchen Clerk Paula Gomez.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Richard Lewis was employed by Hy-Vee as a full-time kitchen clerk from October 20, 2004 until February 18, 2006, when Manager of Perishables Chad Adams discharged him. The final incident that prompted the discharge occurred on February 16, 2006.

From 11:30 p.m. on February 15 until 5:00 a.m. on February 16, Mr. Lewis performed snow removal services for another employer. Mr. Lewis had sufficient notice of the snow removal work that he was able to get some amount of sleep immediately before commencing that work. When the snow removal work was done, the claimant was tired, went home, and went to bed. Later that morning, Mr. Lewis awoke and felt sick to his stomach. Mr. Lewis was scheduled to work at Hy-Vee from 1:00 p.m. to 6:00 p.m. At approximately 10:00 a.m., Mr. Lewis telephoned Hy-Vee and told Kitchen Manager James McCaffey that he did not feel well and would be absent from work that day. The employer's attendance policy required Mr. Lewis to notify the employer at least two hours prior to the scheduled start of a shift if he needed to be absent. This policy was contained in the employer's handbook, a copy of which Mr. Lewis received on the date of hire. Mr. Lewis complied with the attendance policy.

Soon after Mr. Lewis called in sick for his shift at Hy-Vee, a friend contacted Mr. Lewis and indicated a desire to get together with Mr. Lewis later in the day. Mr. Lewis told his friend that he had called in sick for work and was concerned about how it would appear if he ventured away from home. During this conversation, Mr. Lewis did not make arrangements to meet his friend. Mr. Lewis went back to bed and slept until 3:00 p.m. Mr. Lewis felt better after the period of rest. Mr. Lewis did not contact the employer to say he felt better and did not appear for any part of his shift. After Mr. Lewis awoke, he made arrangements to meet his friend later in the day.

Mr. Lewis' friend happened to be the 21-year-old son of Hy-Vee Kitchen Clerk Paula Gomez. At 10:00 a.m.-11:00 a.m., on February 16, Ms. Gomez's son told her that Mr. Lewis planned to "play hooky" from his work at Hy-Vee because he felt the short shift was not worth his while and was going to call in sick. Based on her familiarity with her son and the general unreliability of his statements, Ms. Gomez discounted these statements as unreliable. However, when Ms. Gomez arrived at Hy-Vee for her 1:00 p.m. shift and learned that Mr. Lewis was absent, she told Mr. McCaffey what her son had said. The employer does not schedule excess personnel to work in the kitchen and was short-staffed because of Mr. Lewis' absence.

Ms. Gomez returned home after working her shift. At approximately 9:00 p.m., Ms. Gomez's son arrived with Mr. Lewis. Ms. Gomez commented on Mr. Lewis' absence from work due to alleged illness. Mr. Lewis did not reply.

On February 18, Manager of Perishables Chad Adams confronted Mr. Lewis with the information he had received regarding the circumstances of the absence. Mr. Lewis admitted that on February 16 he did not feel well in the morning, but could have and should have reported for his shift. Mr. Adams discharged Mr. Lewis from the employment. Mr. Lewis had received one prior verbal warning regarding attendance. The employer was unable to provide the date of the warning or meaningful information regarding previous absences.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Mr. Lewis was discharged for misconduct in connection with the employment. It does not.

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.

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).

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). 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).

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).

The employer asserts that Mr. Lewis lied to the employer on February 16 by representing that he was too ill to work. The employer asserts that it would not otherwise have discharged Mr. Lewis in connection with absence.

The evidence in the record establishes a single unexcused absence. In Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989), the Supreme Court of Iowa held that a single unexcused absence did not constitute misconduct for purposes of determining eligibility for unemployment insurance benefits. Mr. Sallis had experienced car trouble on the way to work. Mr. Sallis notified the employer and the employer instructed Mr. Sallis to contact the employer once the car trouble was resolved. Mr. Sallis did not follow the employer's instructions or report to work. The Sallis case did not involve an allegation the employee had falsified the reason for an absence. However, the Court indicated that the effect of an employee's absence on the employer, dishonesty or falsification by the employee with regard to the absence, and whether the employee made any attempt to notify the employer of the absence, were all factors that may be considered in determining whether a single unexcused absence amounted to misconduct.

The evidence in this record establishes only one absence. The evidence indicates that Mr. Lewis did not feel well in the morning after working through the night. Mr. Lewis was not accustomed to working through the night. Regardless of the amount of sleep Mr. Lewis received before commencing the overnight work, it is reasonable to expect that a person under such circumstances would not feel especially well the morning after. Such was the case with Mr. Lewis and he complied with the employer's attendance policy in notifying the employer of his need to be absent. The weight of the evidence does not support the conclusion that Mr. Lewis intended to deceive the employer at the time he called in the absence. The administrative law judge notes that the employer did not call Ms. Gomez's son to testify and that Ms. Gomez testified that her son's utterances are not generally reliable. The fact that Mr. Lewis awoke two hours after the scheduled start of his shift and felt better does not prove by a preponderance of the evidence he earlier misrepresented his condition to the employer. Neither does the fact that Mr. Lewis was ambulatory nor the fact that he met up with a friend later in the day, after his scheduled shift would have ended, establish either deception or an unexcused absence.

Based on the evidence in the record and application of the appropriate law, the administrative law concludes the employer has failed to prove that Mr. Lewis intentionally deceived the employer in connection with the absence. Mr. Lewis' absence on February 16 was an excused absence under Iowa law because it was for illness properly reported to the employer. Even if the absence had been an unexcused absence according to Iowa law, this single absence would not constitute misconduct that would disqualify Mr. Lewis for unemployment insurance benefits.

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

DECISION:

The Agency representative's decision dated March 9, 2006, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided he is otherwise eligible. The employer's account may be charged.

jt/pjs