

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CASIMIRO HERNANDEZ
Claimant

APPEAL NO. 10A-UI-12930-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OSAGE RIVER CITY EGG INC
Employer

OC: 08/22/10
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated September 15, 2010, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was initially scheduled for and held on December 3, 2010. The claimant had provided a cell phone number and the connection was so poor that the interpreter and the administrative law judge could not clearly hear the claimant. As a result, the hearing was recessed and reconvened on December 28, 2010. All of the testimony was taken on December 28, 2010. The claimant participated. The employer participated by Mark Zorzi, partner. The record consists of the testimony of Mark Zorzi and the testimony of Casimiro Hernandez. Ike Rocha served as Spanish interpreter for the claimant.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is an agricultural production facility located in Osage, Iowa. The claimant was hired on June 19, 2008. He was a full-time laborer and also did some packing. The claimant's last day of work was August 24, 2010. He was terminated on August 25, 2010.

The incident that led to the claimant's termination occurred on August 25, 2010. The claimant's work schedule required him to be at work at 6:00 a.m. At 7:36 a.m., the claimant's wife called and told the employer that the claimant would not be at work that day because he had to go get his driver's license. The claimant's shift ended at 2:30 p.m. The employer deemed the claimant's failure to come to work to be a no-call/no-show, as he did not call prior to the start of his shift and did not come to work.

The claimant had two previous instances of no call/no show. These occurred on March 10, 2010, and in May 2010. In addition, the claimant had 59 instances of tardiness or leaving early

between January 1, 2010, and August 25, 2010. In July 2010, the claimant was warned about his attendance and that further violations of the employer's attendance policy would result in termination. At the time of the warning in July 2010, the claimant had had 32 instances of leaving early or being tardy. The claimant's reasons for tardiness were varied but included such things as having a doctor's appointment and transportation problems.

The employer did have a written attendance policy and the claimant was provided a copy of that policy.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence established that the claimant had excessive unexcused absenteeism. Although there were only three instances of no-call/no-show, the claimant accumulated 59 instances of

tardiness or leaving early between January 2010 and August 25, 2010. Mr. Zorzi credibly testified that the claimant was given a verbal warning about his attendance in July 2010 and was told that his job was in jeopardy. At that time, the claimant had 32 instances of tardiness or leaving early. The claimant gave many reasons for his attendance problems, but primarily he cited transportation problems or snow or doctor's appointments. The administrative law judge concludes that the claimant had primarily personal reasons for his attendance problems. He did not cite personal illness as a reason for his absenteeism.

The final incident was a no-call/no-show on August 25, 2010. The employer required employees to call prior to the start of the shift for any absence. An exception was made if there was an emergency. On August 25, 2010, the claimant's wife called after the start of the shift and indicated that her husband would not be in because he was going to get a driver's license. Since the employer's work day ended at 2:30, the employer took the reasonable position that the claimant's absence and failure to call in were not due to an emergency. The claimant could have gotten his driver's license after work or on Saturday. This final absence was misconduct.

Since the employer has sustained its burden of proof to show misconduct, benefits are denied.

DECISION:

The representative's decision dated September 15, 2010, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw